

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 429  
5327413

BETWEEN                      MARIE BENTON  
   Applicant  
  
AND                                NEW ZEALAND TERTIARY  
   COLLEGE  
   Respondent

Member of Authority:        Robin Arthur  
  
Representatives:              George Ireland for Applicant  
   Selena Fox for Respondent  
  
Investigation Meeting:        12 July 2011  
  
Determination:                3 October 2011

---

**DETERMINATION OF THE AUTHORITY**

---

- A.        The decision by New Zealand Tertiary College to disestablish a position held by Marie Benton was made for genuine commercial reasons but how NZTC carried out her dismissal for redundancy was not what a fair and reasonable employer would have done in all the circumstances at the time.**
- B.        NZTC must pay Dr Benton \$5000 as compensation under s123(1)(c)(i) of the Employment Relations Act 2000.**
- C.        Costs are reserved.**

**Employment relationship problem**

[1]        Marie Benton worked for New Zealand Tertiary College (NZTC) in the role of Research and Scholarship Manager from 21 June 2010 until her position was made redundant and she was dismissed on 8 November 2010. NZTC provides training in

early childhood education at certificate, diploma and degree level.

[2] NZTC chief executive Selena Fox met with Dr Benton on 1, 2 and 5 November to discuss the prospect of her position being declared redundant and possibilities for alternative work. A fourth meeting was held on 8 November at which Ms Fox announced her decision and made arrangements for Dr Benton to leave work that day.

[3] Four reasons for the redundancy decision were summarised in an email sent to Dr Benton on 8 November. They were:

- (i) the effect on student numbers at the college resulting from a cap imposed by the Tertiary Education Commission (“the TEC cap”); and
- (ii) delay in approval by the New Zealand Qualifications Authority (NZQA) for NZTC’s postgraduate programme; and
- (iii) a change to the planned number of postgraduate students for 2011; and
- (iv) the lack of other suitable work opportunities.

[4] Dr Benton lodged a statement of problem in the Authority on 23 November 2010 raising a number of claims against NZTC and its treatment of her during her employment. The matter was referred to mediation. While it was not resolved there, Dr Benton then lodged an amended statement of problem with one claim: that her dismissal for redundancy was unjustified because it was not made for a genuine reason and was carried out in a procedurally unfair manner. She sought lost wages, compensation for hurt and humiliation, and costs.

[5] In reply NZTC stated the redundancy was unfortunate but genuine and was carried out in a considerate manner with a full opportunity for input from Dr Benton at each step of the way.

### **Investigation**

[6] For the purposes of the Authority’s investigation written witness statements were lodged by Dr Benton, Ms Fox, NZTC business operations manager James Ward and NZTC academic dean Saras Pillay. Dr Benton, Ms Fox and Mr Ward attended

the investigation meeting in person and, under oath, each confirmed their written statements and answered questions from the Authority member and the representatives. Ms Pillay attended by telephone conference and affirmed her statement. The representatives provided oral closing submissions.

[7] As permitted under s174 of the Employment Relations Act 2000 (the Act) this determination does not record all the evidence and submissions received but states the Authority's findings of facts and law and expresses conclusions on the matters requiring determination.

### **The issues**

[8] The issues for investigation and determination were, broadly:

- (i) whether the redundancy of Dr Benton's position was genuinely decided for the business reasons as stated in NZTC's 8 November email, rather than predominantly for some ulterior motive; and
- (ii) whether the decision was made and how it was made was done fairly and in good faith, including consideration of alternatives and arrangements for Dr Benton's departure; and
- (iii) if a grievance were found, what remedies should be granted, considering lost wages (if the decision were found not to be for genuine reasons) and compensation under s123(1)(c)(i) of the Act (in relation to both or either matters of genuineness and fairness); and
- (iv) costs.

[9] NZTC's decision to make the position Dr Benton held redundant, and how it went about dealing with her about any proposal, decision and consequences of redundancy, would be justifiable if its actions were what a fair and reasonable employer would have done in all the circumstances at the time of the decision and dealings around it: s103A of the Act.

[10] The application of s103A to personal grievances involving redundancy was

described in this way in *Simpsons Farms Limited v Aberhart*:<sup>1</sup>

*[65] ... The statutory obligations of good faith dealing and, in particular, those under s4(1A)(c) inform the decision under s103A about how the employer acted. A fair and reasonable employer must, if challenged, be able to establish that he or she or it has complied with the statutory obligations of good faith dealing in s4 including as to consultation because a fair and reasonable employer will comply with the law.*

...

*[67] ... So long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant is for the employer to make and not for the Authority or the Court, even under s103A.*

[11] A just employer – subject to mutual obligations of confidence, trust and fair dealing and the statutory duty of good faith – will consult on a redundancy proposal and implement any redundancy decision in a fair and sensitive way. Fair treatment may call for counselling, career and financial advice, retraining and related financial support.<sup>2</sup> This requires more than “going through the motions” and will not justify a course of conduct carried out in a way that bruises rather than reasonably minimises the impact on the employee.<sup>3</sup>

[12] The good faith obligations of the Act required NZTC to be active and constructive, responsive and communicative in consulting Dr Benton about changes to the business and proposals which might impact on her, including redundancy: s4, s4(1A) and s4(4). This included providing access to relevant information and an opportunity to comment on the information before the redundancy decision was made: s4(1A)(c).

### **NZTC’s reasons for the decision**

[13] Having asserted that NZTC’s decision on the redundancy of her position was not made for genuine reasons and that her dismissal was engineered for ulterior purposes, Dr Benton bore the burden of convincing the Authority that her theory had

---

<sup>1</sup> [2006] ERNZ 825

<sup>2</sup> *Aoraki Corporation Limited v McGavin* [1998] 1 ERNZ 601, at 619 and 631 (CA).

<sup>3</sup> *Coutts Cars Ltd v Baguley* [2001] 1 ERNZ 660, 673 (CA).

substance. I find she has not met that burden.

[14] I have considered Dr Benton's evidence about various incidents and conversations she had with Ms Fox and other staff during her employment. I have not found any incident or course of conduct sufficient for a conclusion that NZTC's decision about the redundancy of Dr Benton's position was for predominantly ulterior motives to do with various differences of opinion rather than the specific educational and commercial reasons given in its 8 November email.

[15] On those matters I prefer and accept the evidence of Ms Fox and Mr Ward about the combination of commercial factors which led NZTC to review the viability of a number of positions, including that held by Dr Benton during the last quarter of 2010. It is true that NZTC knew about the TEC cap, which affected the number of positions which would be funded and could be provided to domestic students, well before Dr Benton was appointed but its effect on student numbers was heightened by two other factors which came to bear after she took up her position.

[16] Firstly, in October 2010, there was a change in the English language standards required of students for whom English was not a first language. The change applied to NZTC and other education providers. The higher standards, tested in an assessment system referred to as IELTS, were expected to have the effect of reducing enrolments. As a result NZTC anticipated significant reductions of student numbers (both domestic and international) and, in fact, its enrolments did subsequently drop from around 1500 last year to 1200 this year.

[17] Secondly, there was an unexpected delay in NZQA approval of a new postgraduate programme which would allow NZTC to teach and award masters and postgraduate diploma courses. NZTC had hoped for approval to be given in time for a postgraduate student intake in the latter part of 2010. While NZTC was informally advised that approval would almost certainly be given once NZQA completed its internal decision-making process, the delay led to Ms Fox and Mr Ward reassessing the budget and expected income stream from postgraduate courses. The delay meant income budgeted from the last quarter of 2010 would not actually be generated until sometime in 2011.

[18] While NZTC did not provide detailed documentary evidence on each of these factors, I find Dr Benton knew enough about them and their likely effects on NZTC to be able to adequately engage in the consultation meetings held with her in early November.

[19] NZTC's review of its business, in the light of those factors, considered not only the affordability of Dr Benton's position but at least two others at the time – an enrolment administrator and an IT employee. Those two positions were also disestablished.

[20] Dr Benton's position was primarily established as part of NZTC's plans for a postgraduate programme. She spent some time assisting with preparation for an NZQA review of NZTC and it was intended she would teach in some part of the postgraduate programme as well once it was underway. The delay and ongoing uncertainty about when formal approval of the postgraduate programme might be received meant NZTC was incurring the costs of her position without receiving the revenue it had anticipated to fund that job and others on its staff.

### **How the decision was carried out**

[21] Dr Benton was asked for her ideas about alternative roles or tasks to which she could be redeployed in the event of the disestablishment of her position. She came up with a number of ideas. From the evidence of both Ms Fox and Dr Benton, I find those ideas were fairly considered by Ms Fox but rejected for valid commercial reasons. Expansion into education on health issues and providing seminars open to the public had previously been considered and rejected as either not viable or within NZTC's present capacity. Doing work on field practice administration or teaching on cultural papers or doing other teaching, assessment and moderation tasks was covered by other existing staff, and there was commercial pressure on NZTC to decrease those staff numbers as well, not increase them by adding the costs of employing Dr Benton to those areas of NZTC's budget. Ms Fox accepted Dr Benton's proposals to work on professional development materials and setting up a school of excellence for students in their last year of study were good ideas but decided NZTC could not afford to have

her work on them at that time.

[22] While NZTC did take proper steps to consult Dr Benton about the proposal to disestablish her position and consider alternatives to her dismissal, the consultation then fell short on some important, subsequent steps. A fair and reasonable employer, having consulted the employee and made a decision to disestablish that employee's position, will take care that the employee is able to leave the employment with dignity and has support in moving on into the next stage of their working life.

[23] NZTC, I find, failed to meet that standard in how it dealt with Dr Benton's departure once Ms Fox informed her of the decision on 8 November 2010.

[24] Ms Fox told Dr Benton she could "finish up" that day and take four weeks paid notice "to look for other opportunities". Dr Benton did not freely choose to leave that day, rather, I find, she agreed to Ms Fox's suggestion that she do so. Dr Benton then asked if that could occur at noon and for the reasons for her dismissal and the information about the paid notice to be put in writing before she left. Ms Fox agreed to provide an email with that information in it and for Dr Benton to leave once she had completed an exit checklist. Dr Benton went to her office to wait for the email from Ms Fox but found her phone and email access were already cut off. In her evidence to the Authority Ms Fox explained this was not intentional or arranged by her but may have occurred through some technical glitch. However neither Ms Fox nor Mr Ward could adequately explain how this occurred to Dr Benton but not other staff members in the same office area that day.

[25] Although Ms Fox had referred in the final meeting to Dr Benton's employment agreement providing for four weeks' notice, the actual provision required eight weeks notice. While that error was rectified more than three months later, Ms Fox should have accurately identified NZTC's contractual obligations in the first place and planned how Dr Benton's departure would be managed within the full period of notice rather than, even if unintentionally, misrepresenting it.

[26] While NZTC's offer of four weeks' paid leave went some way to meeting its support obligations, Ms Fox did not enquire about or offer Dr Benton access to job

counselling or EAP services or check Dr Benton had access to resources which would assist her job search (and would have been available had she stayed nominally ‘at work’ during that period, such as email, printing out applications, photocopying and so on). It may have been that Dr Benton would not have wanted any of those options but NZTC had not taken those basic steps in the event that she would have, if asked.

[27] Neither did NZTC enquire about or arrange any appropriate farewell for Dr Benton. During her time with NZTC Dr Benton had been associated with aspects of its programme which addressed Maori cultural issues and had been welcomed on her appointment in a way in which she was able to *mihi* or greet and introduce herself to colleagues. It would have been appropriate for NZTC to similarly ensure she could be farewelled in a dignified manner.<sup>4</sup> That is so whether the standard of NZTC’s conduct in that regard is measured against specific Maori cultural values – about which it offered courses to its own students – or the general social value of treating respectfully someone who is losing their position on the ‘no fault’ basis of redundancy.

[28] Instead Dr Benton was left with the feeling of being hurriedly bundled out of the premises as if she had done something wrong rather than having to go because of various educational and commercial decisions for which she was not responsible and over which she had no control. If Ms Fox was unsure of how to deal with that cultural aspect, other NZTC staff could have advised on and assisted with arranging a suitably dignified departure for Dr Benton.

### **Determination**

[29] For the reasons given I find NZTC’s decision to disestablish the position held by Dr Benton was made for genuine commercial reasons. However the manner in which Ms Fox carried out Dr Benton’s dismissal was, in all the circumstances, less than what a fair and reasonable employer dismissing an employee for redundancy would have done. NZTC’s actions were unjustified. Dr Benton is entitled to remedies for the distress caused to her by the manner of her dismissal.

---

<sup>4</sup> *Good Health Wanganui v Burberry* [2002] 1 ERNZ 668 at [57] (EC).

**Remedies**

[30] As the redundancy of the position was found to be for genuine rather than ulterior reasons, Dr Benton is not entitled to a remedy for lost wages.

[31] Neither can her distress about the loss of the job itself be compensated for as that has been accepted as being for genuine reasons. However on the basis of her evidence of feeling humiliated and losing dignity by how her dismissal was carried out, Dr Benton is entitled to an order for compensation under s123(1)(c)(i) of the Act. Considering the particular circumstances of the case and the general range of awards in matters of this kind, I order NZTC to pay Dr Benton \$5000 in settlement of her personal grievance.

**Costs**

[32] Costs are reserved. The parties are encouraged to agree any matter of costs between themselves. If they are not able to do so and a determination of costs by the Authority is required, Dr Benton may lodge and serve a memorandum as to costs by no later than 28 days from the date of this determination. NZTC would then have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this timetable without prior leave being sought and granted. If a determination is necessary the parties could expect costs to be awarded on the basis of a notional daily rate, currently around \$3000, and the principles summarised in *PBO Limited v Da Cruz* [2005] ERNZ 808.

Robin Arthur  
Member of the Employment Relations Authority