

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 443
5346552

BETWEEN HAYLEY CHAIMOWITZ
Applicant

AND GOLDMAN HENRY
CAPITAL MANAGEMENT
LIMITED
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Jo Phipps, advocate for Applicant
 Persia Knapp, counsel for Respondent

Investigation Meeting: 16 August 2011

Submissions Received: 25 and 30 August, 6 September 2011

Determination: 12 October 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant Ms Hayley Chaimowitz claims that her dismissal by the respondent Goldman Henry Capital Management Limited (GHCM), on the grounds of redundancy, was unjustified. Further she claims a payment made in lieu of notice of the dismissal was insufficient and that she was not paid her full entitlement of untaken annual leave accruing at the end of her employment.

[2] After raising personal grievance claims of unjustified dismissal and disadvantage on 27 May 2011, and after unsuccessfully undertaking mediation with GHCM, Ms Chaimowitz applied to the Authority under s 127 of the Employment Relations Act 2000 for an order of interim reinstatement. In a determination dated 14 July 2011 – [2011 NZERA Auckland 308] – the Authority for the reasons given declined the order sought.

[3] Following an investigation meeting Ms Chaimowitz asks the Authority to determine that her dismissal was unjustified and to award remedies for lost remuneration resulting from her personal grievances and for the inadequate payments made in lieu of notice and untaken annual holidays. She seeks compensation for hurt feelings, humiliation and distress, and for loss of the benefit of paid parental leave she expected to take under the Parental Leave Employment Protection Act 1987.

[4] GHCM is a financial services company specialising in international equity funds. Ms Chaimowitz was the Financial Controller of the company and had the title Chief Financial Officer (CFO) when her employment was terminated in May 2011. She had previously worked as an Investment Banker and was employed by GHCM for two years.

[5] The first indication given to Ms Chaimowitz that the future of her position was under consideration came on 15 March 2011 at a meeting with Mr Brian Henry, Managing Director of GHCM, and his PA Ms Kathryn Healey. Mr Henry gave Ms Chaimowitz a memorandum referring to compliance issues in relation to back office functions including those that were part her role as CFO. The memorandum referred to the necessity for a redistribution of the CFO's work for security reasons, so that it could be undertaken by more than one staff member.

[6] The memorandum concluded with the following:

5. *The splitting of the roles will force the company to create two part-time jobs as we do not have either the funding or the work to continue with a full-time CFO.*
6. *We are required under Hayley's contract to consult on changes that may result in redundancy, to this end no decision can be made on how we address this issue until Hayley has had a chance to provide input into the issue.*

[7] Ms Chaimowitz was shocked and distressed by what she was told at the meeting on 15 March. That is all the more understandable given her personal circumstances. She was married with one young child and expecting another at the end of June. She had earlier advised Mr Henry of this fact and of her intention to take paid parental leave available under the Parental Leave Employment Protection Act 1987. She made application for that leave later in the month, after the meeting on 15 March.

[8] Ms Chaimowitz continued to perform her work as CFO until 4 May when at a further meeting Mr Henry told her to go on garden leave. She was given a letter written by him setting out a proposal to address the compliance issues by dividing up the work of the CFO role. Under the proposal some of the work would be contracted externally and the remaining tasks distributed between one of the firm's Directors and a part-time employee. The letter advised that if the proposal was implemented the CFO position would cease to exist. Ms Chaimowitz was advised that notice of four weeks would be given under the terms of her written employment agreement in that event, and she was advised:

In accordance with current industry practice, it is likely that the notice period will be worked out on the basis of 'garden leave'. This means that all keys, phones, and any other company property would be returned before the start of your 'garden leave'. At the end of the garden leave all other entitlements (e.g. holiday pay) as per your employment agreement and under the Employment Relations Act 2000 are payable.

[9] Mr Henry emphasised in his letter that the restructuring detailed in it was a proposal only at that stage and the Directors of GHCM had made no final decision about how to resolve the risk issues or about disestablishing the CFO role. Ms Chaimowitz was offered an opportunity to provide any feedback or input she wished to in respect of the contents of the letter, and for this purpose Friday 6 May or a suitable alternative date was suggested. Ms Chaimowitz was invited to bring a support person if she wished or, if she preferred, to submit her written views to GHCM.

[10] It appears that the garden leave was required to commence on 4 May even before a decision had been made about the restructuring proposal. This was also before Ms Chaimowitz had been given any notice of termination of her employment. However, when the nature of the leave was questioned Mr Henry clarified his intention for it to be medical leave, which he felt should be taken by Ms Chaimowitz because it had been noticed that she seemed unwell. The leave idea had come up through concern felt for Ms Chaimowitz, according to Mr Henry's evidence.

[11] The next meeting was held on 9 May. Ms Chaimowitz attended with Robbie her husband. In preparation for it a letter addressed to Ms Chaimowitz had been drafted by GHCM and signed by a Director of the firm. The letter contained the terms

of an offer to be put to Ms Chaimowitz for her agreement as to how the matters of the restructuring of her position and her pending parental leave would be resolved.

[12] The letter began with confirmation that the financial controller position held by Ms Chaimowitz had been made redundant due to the financial reporting compliance requirements of the company. The redundancy was to take effect four weeks after 9 May, on 6 June 2011. Ms Chaimowitz was to be on medical leave on full salary until 19 May and from that date her state funded maternity leave would commence. When her employment ceased on 6 June she would be paid an *ex gratia* sum of \$2,400. The letter also advised that until 6 June if Ms Chaimowitz was not required to provide assistance to the company she would be free to undertake any activities she desired and that she would be provided with a reference by the Managing Director Mr Henry.

[13] Although it was shown to her then the letter was not given to Ms Chaimowitz by Mr Henry at the meeting of 9 May. This was because Ms Chaimowitz insisted that her employment should not be terminated before her baby due on 30 June was born or before the date of the first payment for her parental leave. She had been advised by the Inland Revenue Department that her first payment would be on 7 July.

[14] Mr Henry had researched the Parental Leave Employment Protection Act and its provisions and seen nothing in it to prevent Ms Chaimowitz from applying to have the beginning of the leave commence before her employment had ended.

[15] Mr Henry asked Ms Chaimowitz during the 9 May meeting whether she accepted the need for her position to be disestablished. She agreed that was so and that redundancy was the only viable option.

[16] During the 9 May meeting Mr Robbie Chaimowitz asked about the availability of the part-time job proposed as part of the restructuring and was told that Ms Chaimowitz could apply for it. Up to this point Ms Chaimowitz had indicated plainly that she needed to maintain full-time work to support her family. The part-time job had been posted by GHCM on SEEK since 3 May, seeking a Settlements Clerk to work part-time at a salary of \$15,000 - \$30,000 per annum depending on experience. Five to ten hours work per week was proposed, with flexibility for school/creche requirements.

[17] When no agreement could be reached about bringing forward the commencement of paid parental leave it remained for GHCM to make a decision about the restructuring proposed by it. When the question of Ms Chaimowitz returning to work at the office was discussed she produced a medical certificate her midwife had signed earlier that day, which stated:

Hayley is fit & able to work up to date of scheduled c/s [caesarean section] on 30 June 2011.

[18] Mr Henry disagreed that she was well enough to be working and directed that she remain on paid medical leave until the future of her position had been decided.

[19] GHCM subsequently decided to proceed with the restructuring and wrote a letter to Ms Chaimowitz which was dated 13 May 2011. It advised, amongst other things, the following:

Since there are no comparable alternative positions we can offer you, we confirm that your employment will terminate on grounds of redundancy, effective Monday 16 May 2011. Since the role is being disestablished, we are electing to give you pay in lieu of notice and enclose a cheque for four weeks salary in lieu of notice. Included in this cheque is holiday pay (since 1st January 2011).

[20] The letter was addressed to Ms Chaimowitz at her home in Auckland, where she had remained on leave as directed by Mr Henry. On 25 May when it was seen by GHCM that the cheque sent had not been banked Ms Chaimowitz was contacted. She advised the letter had not been received. The cheque was cancelled, reissued and sent again on 25 May.

[21] Without needing evidence the Authority can recognise generally that mail does get misdirected from time to time. Possibly in the case of the letter sent to Ms Chaimowitz the fact that there were several letterboxes at the entrance to their driveway may have played some part in it going astray. It might well be that if Ms Chaimowitz had been at work, as she had wanted to be, the letter would have been handed to her and the issue over communication of notice would not have arisen.

[22] I accept the evidence of Ms Chaimowitz and her husband that for some reason they did not receive the letter with the cheque enclosed after they were sent to them. Accordingly the notice of termination given in the 13 May letter was not communicated and was therefore ineffective. Proper notice I find was not given until 25 May, up to which date Ms Chaimowitz was entitled to be paid although, at Mr

Henry's insistence, on medical leave. From 25 May she was entitled to one months notice or pay in lieu of notice.

[23] Ms Chaimowitz is therefore entitled to payment of \$1,846 salary from GHCM for an additional 12 days, to allow for the date on which notice was actually received.

Justification

[24] The test of justification for a dismissal or other action of an employer is set out at s 103A of the Act, as follows:

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 circumstances at the time the dismissal or action occurred.

[25] Justification must be determined on an objective basis and in applying the test at s 103A(3) and (4) the Authority must consider four particular factors and any others it thinks appropriate. In particular consideration must be given to;

- whether the employer sufficiently investigated allegations against the employee;
- whether the employer raised concerns that the employer had with the employee before dismissing;
- whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns; and
- whether the employer genuinely considered the employee's explanation in relation to allegations against the employee before dismissing.

[26] In so far as these factors are relevant to a termination for redundancy, a situation where there is usually no fault on the part of employees in relation to their conduct or performance, the factors may have less application than in cases of dismissal for poor performance or misconduct. Under s 103A(5) a dismissal or action is not to be determined as being unjustifiable by the Authority solely because of defects in process if the defects were minor and did not result in the employee being treated unfairly.

[27] There is no dispute in this case that GHCM the employer had genuine business or commercial reasons for restructuring the CFO position Ms Chaimowitz was employed in. Failure to change it would have had serious consequences for the firm and its operations, and I accept that there was simply no alternative other than to disestablish the position and redistribute its functions or duties to at least two persons. As a result maintaining a full-time position was not an option either. I therefore find that termination of the employment of Ms Chaimowitz was substantively justifiable.

[28] I also find that she was adequately consulted about the restructuring proposals before they were implemented. Given that Ms Chaimowitz had made it clear to Mr Henry that she needed a full time position, it was sufficient for her to be invited to apply for the advertised part time position. She chose not to. A fair and reasonable employer was able to act in the way GHCM did in terminating the employment of Ms Chaimowitz, I find.

[29] Whether there was any lack of justification in the way the employer acted is an issue about the timing or sequence of events intended to occur before or after the birth of Ms Chaimowitz's child, expected to be on 30 June.

[30] Ms Chaimowitz had maintained that there was no good reason why her employment could not be terminated after the birth of her child, or at the time of the first payment of paid parental leave. Mr Henry's evidence was that the company could not leave the restructuring until the end of June when the first half of the reporting year for the company closed, and to avoid an unfavourable audit it had to move as quickly as possible to implement changed procedures.

[31] I accept that Mr Henry had been prepared to make a reasonable offer to allow Ms Chaimowitz to receive paid parental leave and also to finish her employment with a payment above her contractual entitlement to notice.

[32] In this regard a fair and reasonable employer could be prepared to be flexible, and this I find is what GHCM was. In response Ms Chaimowitz had been adamant that the arrangements she had made could not be changed and so she declined the offer. In the circumstances I do not consider there was any procedural lack of justification for the termination.

[33] It follows from the finding that the dismissal of Ms Chaimowitz was justifiable, that she is not entitled to recover payment for parental leave under the

Parental Leave Employment Protection Act 1987 after her employment had ended on 22 June. It also follows that she is not entitled to recover salary from 22 June until the start of the paid parental leave she had intended taking.

Unjustified disadvantage grievance

[34] However I do consider that GHCM acted without justification and to the disadvantage of Ms Chaimowitz in her employment by insisting that she go on medical leave despite the best evidence, available from Ms Chaimowitz herself and her midwife, that this was unnecessary.

[35] I am quite satisfied that Mr Henry has overstated his concern for Ms Chaimowitz and her welfare as being his primary motivation in requiring her to be sent home from the firm. His true motivation can be seen in the letter of 4 May with its reference to the likelihood of the notice period being worked out on the basis of “garden leave.” This was stated to be “in accordance with current industry practice,” although no evidence was given about industry practice.

[36] In his evidence about this Mr Henry, who is careful with his words, referred to Ms Chaimowitz as a “disaffected” employee. That seems to have been the view he had, unfavourably, of employees being allowed to be present and working in an office under circumstances where redundancy affecting them had been or was about to be implemented.

[37] I do not consider that a fair and reasonable employer could have sent an employee home in the face of the only medical advice available, which was that Ms Chaimowitz was fit to work. Mr Henry would have been on stronger ground had he required Ms Chaimowitz on 9 May to go and consult with another midwife, or a doctor or specialist, and return with a medical certificate before he would permit her to continue working. Medical science rather than morals as Mr Henry claims he was motivated by, was the only fair and reasonable way of resolving the issue of whether Ms Chaimowitz was risking her health and that of her unborn child by working.

[38] I therefore consider, applying s 122 of the Act which permits a finding that a grievance is of a type other than that alleged, that Ms Chaimowitz was unjustifiably disadvantaged in her employment. This occurred through the actions of GHCM in sending her home on 4 May without proper grounds and when she could reasonably have expected under the employment agreement that performance of her work would

continue until the contract was lawfully terminated. Pregnancy is not to be regarded as an illness and Ms Chaimowitz had been certified as fit to work until the birth of her child by caesarean section on 30 June.

[39] I find that this action added to the shock and distress already suffered by Ms Chaimowitz upon learning that her job was to go. I do not consider that the defect in this regard was minor or that it did not result in Ms Chaimowitz being treated unfairly. The defect amounted to a repudiation of Ms Chaimowitz's right to continue performing work under her employment agreement for payment in return. She was blameless as to the situation that gave rise to this grievance. Ms Chaimowitz is entitled to compensation under s 123(1)(c)(i) of the Employment Relations Act. The amount I fix as \$5,000.

Annual holiday pay

[40] The difference between the parties as to what is owed seems to be two days. I accept as correct the email records of GHCM produced by Ms Healey showing the leave taken by Ms Chaimowitz, except I consider that the firm's 'gift' or 'bonus' days should not be included as part of her annual leave entitlement. The parties are to recalculate the annual leave due, if any, and reach agreement on the amount owing. A determination will be given by the Authority if the issue cannot be resolved.

Determination

[41] For the above reasons the Authority finds an unjustified disadvantage personal grievance has been established and makes the following orders against GHCM in favour of Ms Chaimowitz:

- To pay \$1,846 as salary due to 22 June 2011,
- To pay \$5,000 compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act.

Costs

[42] Costs are reserved. The parties through their representatives are requested to try and resolve any question of costs themselves. In doing so they may wish to consider the results to them of the interim application and the substantive matter now determined. Ms Chaimowitz was unsuccessful in the former. In the latter GHCM

was unsuccessful in responding to the disadvantage grievance and claim for additional salary in lieu of notice but did successfully respond to the dismissal grievance and remedies claimed for that.

[43] Those mixed results might warrant an order that costs should lie where they fall, if the Authority is asked to decide the question.

[44] If the parties cannot settle costs Ms Chaimowitz may apply for an order within 14 days of the date of this determination and GHCM shall have a further 14 days in which to reply.

A Dumbleton
Member of the Employment Relations Authority