

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Linda Clarke (Applicant)
AND Nalder & Biddle (Respondent)
REPRESENTATIVES Brent Climo, Advocate for Applicant
Graham Allan, Counsel for Respondent
MEMBER OF AUTHORITY James Crichton
INVESTIGATION MEETING Nelson 16 August 2006
DATE OF DETERMINATION 21 August 2006

DETERMINATION OF THE AUTHORITY

Oral determination

[1] At the conclusion of the investigation meeting, I sought the parties' indulgence for a brief adjournment and then issued an oral determination which this written determination records.

Employment relationship problem

[2] The applicant (Ms Clarke) was employed by the respondent which was at the relevant time Nalder & Biddle (Nelson) Limited (Nalder & Biddle). She worked as an administration clerk with Nalder & Biddle and had fulfilled that role or a similar role for 19 years.

[3] Ms Clarke gave evidence that she was called into the office of the Chief Executive, Mr Alan Price on 7 July 2005 and without any preliminaries was told that her position had been disestablished because of a restructure that had come about as a consequence of the business being sold.

[4] Ms Clarke said this intelligence came to her as *a bombshell* although she knew there was something going on by rumours flying around the business. It was common ground that there had been no previous advice to Ms Clarke (or indeed other staff it seems) that her job was at risk.

[5] The discussion in Mr Price's office included Ms Pauline Warne who was then assisting the firm in an acting capacity as Chief Financial Officer. Ms Warne gave evidence at the investigation meeting, agreed that the meeting was brief, indicated that it was a difficult meeting both for Mr Price and for Ms Clarke and confirmed that Mr Price had made it clear to Ms Clarke that her position was redundant and that she was not required to work out her notice.

[6] Ms Clarke then left Mr Price's office in tears, was comforted by Ms Warne and others and ultimately left the workplace at about 4.30pm that day having, she says, spent a little time tidying up her desk.

[7] Ms Clarke then returned to the workplace the following day and seems to have agreed with Ms Warne that she need not return, and indeed did not return.

[8] Mr Price's evidence was that he had hoped that Ms Clarke would continue to work for a period as she was very good at her job, the business was in serious financial difficulty and amongst other things, Ms Clarke was good at collecting money from recalcitrant debtors.

[9] Notwithstanding Mr Price's enthusiasm for Ms Clarke continuing, it seems evident that that message was never properly communicated to Ms Clarke as she left the workplace virtually immediately after the 7 July meeting and did not return.

[10] Ms Clarke says that she was made redundant in a procedurally unfair manner. In its statement in reply, Nalder & Biddle resist that claim by resting on the terms of a letter dated 10 November 2005 written by Mr Price to Ms Clarke's advocate, the thrust of which is that Ms Clarke terminated the 7 July meeting before it was finished, that the parties never concluded their discussion and in particular did not agree about how long Ms Clarke would continue working for Nalder & Biddle notwithstanding that her job had been disestablished and that, in effect, Ms Clarke had abandoned her employment when she departed the workplace on the day after the fateful meeting.

[11] However, at the investigation meeting, Nalder & Biddle had changed its position and in a brief of evidence filed for the investigation meeting by Mr Price, he gave evidence of the circumstances of the 7 July meeting that for most practical purposes was similar to the evidence given both by Ms Warne at the investigation meeting and by Ms Clarke herself.

[12] While maintaining that the timing of Ms Clarke's departure from the workplace was something that had not in fact been agreed between the parties and that the meeting on 7 July had terminated earlier than he would have liked because of Ms Clarke's distress, Mr Price acknowledged that the 10 November letter was ill-judged, that he regretted writing it, and that as soon as he had sent it, he was anxious about it. He referred to being under terrible business pressure as a consequence of a dramatic collapse in the business's fortunes and simply indicated that his mind was not clear when he wrote the letter in question. I accept Mr Price's evidence on that point and do not believe that his behaviour was activated by impure motives but was simply a function of the stresses that he was then enduring as a consequence of the rapid demise of some of his business interests.

Determination

[13] There can be little doubt that the process used by Mr Price to terminate Ms Clarke's position on the grounds of redundancy was inadequate. The interview during which the termination was notified came as a terrible shock to Ms Clarke and that was because there had been no preliminary notification, either generally or specifically, about the imminence of redundancy. Ms Clarke was given no opportunity to have a support person present, and was not given any notification of the nature of the meeting before she was summoned to it.

[14] By virtue of those failings as to notice, the meeting of course went badly as one would expect and Ms Clarke it seems was virtually disabled by her emotional response and Mr Price does not seem to have fared a great deal better. It follows that there was no opportunity in the meeting for any genuine opportunity to consider alternatives to redundancy, or indeed for Ms Clarke to have any opportunity to advance views about the possible disestablishment of her position. Indeed, all the evidence suggests that Ms Clarke was presented with a *fait accompli*.

[15] Having said all that about the process used by Nalder & Biddle, I need to balance that by making clear the evidence from the employer of their dire financial circumstances amply justifies the conclusion that the redundancy was genuine in a business sense.

[16] I also make clear that I do not consider the insensitive and ill-considered process adopted by Nalder & Biddle was activated by bad faith, but simply by thoughtlessness and the pressures of the moment.

[17] The letter of 10 November 2005 makes personal criticisms of Ms Clarke in the context of endeavouring to explain the employer's inadequacies in dealing with the redundancy. Had the letter not been written, the parties may well have been able to resolve matters by agreement without the necessity for an investigation meeting. Certainly, the position adopted by Nalder & Biddle at the investigation meeting made a resolution of the employment relationship problem more straightforward than would have been the situation had Nalder & Biddle persevered with the view of the facts advanced in the 10 November letter.

[18] The letter was particularly regrettable because it makes personal allegations about Ms Clarke which are neither factual nor warranted.

[19] It is clear law that compensation in redundancy situations can only attach to the breach of process and cannot apply to the loss of the position itself. With that in mind, I think the appropriate sum for Nalder & Biddle to pay to Ms Clarke is the sum of \$4,500 as compensation under s 123(1)(c)(i) of the Employment Relations Act 2000. I order payment of that sum.

[20] Having established the existence of a personal grievance by reason of the unjustified action of the employer causing disadvantage to Ms Clarke, I need to address the issue of contribution and I find that there is no evidence whatever of any contribution to the improper process by Ms Clarke.

[21] I need now to turn my attention to consider whether there are lost wages payable. As a consequence of the modest redundancy settlement which Ms Clarke was entitled to by virtue of her employment agreement, she was paid a month's salary. However she was out of work for three months and in all the circumstances, I direct that Nalder & Biddle are to pay Ms Clarke two month's salary to make up the shortfall which she experienced. Had the parties been able to engage with one another in terms of a finish date, Ms Clarke might well have come to an appropriate arrangement with Mr Price, the effect of which was that she worked for a longer period and perhaps was able to reach an agreement with Nalder & Biddle which would have brought her tenure to an end by agreement.

Costs

[22] The parties have asked me to make a costs order as well and I now do so. Ms Clarke's advocate tells me that his costs are in the order of \$500. This seems most reasonable. The investigation meeting was only an hour and a half in duration, but there was preparation time of course before that and, as I have mentioned earlier, had the employer not issued the letter of 10 November 2005 and consistently maintained the stance that it adopted at the investigation meeting, the matter might well have been resolved by agreement at a much earlier date.

[23] In all the circumstances then, it is appropriate that Nalder & Biddle meet Ms Clarke's representation costs in full and I direct that Nalder & Biddle are to pay those costs up to a maximum of \$700 inclusive of GST and any disbursements.

Personal relationship

[24] Mr Price and Ms Clarke had worked together for nearly 20 years and clearly thought well of each other for all of that time until the final meeting between them. That meeting changed matters and scarred both of them. It is pleasing that the parties' representatives have willingly explored my suggestion that they find a way in which Mr Price can express his regret to Ms Clarke about the events surrounding her redundancy. I understand that the parties have

agreed a form of words by which Mr Price might do that. I commend both parties for their willingness to try to heal those wounds in this very appropriate way.

[25] The representatives are also to be commended for their practical and common sense approach in assisting the Authority to resolve this employment relationship problem.

James Crichton
Member of Employment Relations Authority