IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 244/09
5139308

	BETWEEN	AILEEN CUTTING-GARDNER Applicant
	AND	BMC ENGINEERING LIMITED Respondent

Member of Authority:	R A Monaghan
Representatives:	P Faidley, advocate for applicant I Davidson, advocate for respondent
Investigation Meeting:	26 May 2009
Submissions received:	2 and 12 June 2009 from applicant 10 June 2009 from respondent
Determination:	22 July 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] BMC Engineering Limited ("BMC") employed Aileen Cutting-Gardner to carry out various office and administrative duties. It terminated her employment on the ground of redundancy.

[2] Mrs Cutting-Gardner says she was dismissed unjustifiably. She says the redundancy was not genuine and there were procedural flaws in the way it was effected. She also says BMC breached its duty of good faith in that it engaged in misleading and deceptive conduct towards her.

[3] There was an additional complaint that no written employment agreement was provided. No remedy in respect of that matter was specified.

The employment relationship

[4] BMC operates in the agricultural engineering industry, manufacturing grading and packaging machinery for produce such as potatoes, carrots, onions and some fruits. Approximately half of the machinery is manufactured for the export market.

[5] Mrs Cutting-Gardner's employment with BMC began on 22 April 2007. The employment was part-time, being 22 hours per week over four days per week. Mrs Cutting-Gardner's duties were essentially clerical. They included; receiving mail; compiling debtor invoices; receiving creditor invoices; payroll; inputting debtor, creditor and payroll information on the MYOB system used by the business; generating reports and spreadsheets from this data; and streamlining office procedures.

[6] At the time BMC also employed tradesmen and technicians in its manufacturing plant, as well as 3 office staff including Mrs Cutting-Gardner. The other two members of the office staff were responsible for business development and drawing, design and procurement respectively.

[7] From about July 2007 Micaela Collis, a practising accountant in a firm engaged by BMC, provided considerable assistance to Mrs Cutting-Gardner. She prepared month-end accounts, as well as GST, PAYE, and monthly reporting including debtors/creditors/stock, general ledger and monthly profit and loss reports, assisting Mrs Cutting-Gardner with many of the clerical duties ancillary to these activities or carrying them out herself. She described her role as very hands on, although she also provided training to Mrs Cutting-Gardner in certain tasks which she was later able to hand over to her.

[8] For her part Mrs Cutting-Gardner acknowledged she did not have experience with MYOB, and required assistance from Ms Collis. Fortunately for the parties Ms Collis happened to be an accredited MYOB trainer. I regard Mrs Cutting-Gardner's relatively constant access to one-on-one assistance from Ms Collis as likely to be more beneficial to her than attendance at a group MYOB training course.

[9] Mrs Cutting-Gardner's relationship with Barrie Richdale, BMC's director and shareholder, had its difficulties and disagreements. Early in the relationship, Mrs Cutting-Gardner offered her resignation, primarily because she was not satisfied with the standard of cleanliness in the workplace. However she was persuaded to stay, and did so. Of her own volition she added cleaning to her duties.

[10] To the extent that any of these disagreements were intended to support a personal grievance on the ground of unjustifiable action causing disadvantage, they were not raised with the employer within the 90-day period required in s 114 of the Employment Relations Act 2000, and no application has been made for leave to raise them. I therefore take them no further in that context.

[11] From about mid 2008 Mr Richdale, who was nearing retirement age, sought both a successor for the business and a way of complementing his retirement. In consultation with his professional advisors he concluded there was significant intellectual property in the company's design, machinery, plant and systems. He also believed that much of the associated information was obsolete or obsolescent in the New Zealand environment, but that the information could be invaluable elsewhere. He decided to split BMC into a licensing and intellectual property arm to be retained, and to sell the remaining local engineering business.

[12] To achieve that it was necessary to ensure BMC's accounting practices were solid, before finalising the necessary records and moving to divide or restructure the company. A full-time staff member would be required to carry out accounting and administrative duties.

[13] On 9 October 2008 Mr Richdale met with Mrs Cutting-Gardner to advise of his plans, and in particular that a full-time position was likely to be necessary.

[14] Mrs Cutting-Gardner responded with a written list of questions, to which Mr Richdale replied in a letter dated 9 October but received on 14 October. The letter advised that Mr Richdale was not yet in a position to answer all of the questions, but indicated the nature of the restructuring and an expectation that restructuring be completed by August 2010. Regarding the effect on Mrs Cutting-Gardner, it advised that a full-time administration manager would be required and that interviews for the

position would be conducted. Mrs Cutting-Gardner's options were seen as proposing alternative means of achieving the same end, or applying for the new position.

[15] A further meeting was suggested, but delays in Mrs Cutting-Gardner's securing of another representative meant it was some time before she responded and before the meeting could be arranged.

[16] Meanwhile on 20 October BMC placed advertisements on the 'Seek' website for an administration manager. The duties and responsibilities were listed in broad terms, and included PAYE and GST, and monthly reporting. Required experience included MYOB, accounts to trial balance, and 'opportunity to lead business accounting system in planned restructure.' Mr Richdale advised Mrs Cutting-Gardner of the advertisements by letter dated 20 October, and asked her to forward her CV to Ms Collis by 28 October if she wished to apply. Mrs Cutting-Gardner consulted with Ms Collis about whether to apply, and subsequently forwarded an application.

[17] The meeting sought in the 9 October letter went ahead on 28 October. The parties attended with their advocates. It was common ground that Mr Richdale began by giving an account of his intentions regarding the separation of the business, and addressing the impact on Mrs Cutting-Gardner's position. Mrs Cutting-Gardner's advocate made suggestions including that Mrs Cutting-Gardner retain her position and be given extra training. He also raised a concern that no shortcomings in her performance had been drawn to her attention. Other alternatives the parties canvassed included retaining Mrs Cutting-Gardner's position and creating a separate position to carry out the additional duties associated with the restructuring.

[18] BMC did not consider these alternatives suitable and continued the recruitment process. Mrs Cutting-Gardner was interviewed for the full time position on 31 October. Ms Collis and Mr Richdale were the interviewers. Ms Collis had prepared a list of interview questions which were put to all applicants, including Mrs Cutting-Gardner.

[19] After each interview Ms Collis and Mr Richdale evaluated the applicants. Two of the applicants scored higher than the other two. One of the two with a higher

score accepted the position. Mrs Cutting-Gardner scored lowest, and her evaluation included the comment 'knowledge is lacking, would need a great deal of help.'

[20] By letter dated 5 November 2008 Mrs Cutting-Gardner was notified that she was not the successful applicant, and that the successful applicant was to start work on 11 November. The letter went on to say:

> "Your current position will become redundant effective from that date.
>
> It now remains for us to negotiate a mutually acceptable separation agreement. As a starting point BMC is prepared to pay for the Leadership course you expressed an interest in.
>
> Can you please give me a date, time and place that we can meet (with or without our respective advisors) to finalise the terms of your redundancy?"

[21] It appears Mr Richdale and Mrs Cutting-Gardner had a conversation about the redundancy that day, but neither had an accurate recollection of what was said. On or about 6 November the two reached an arrangement in which Mrs Cutting-Gardner's last day of work would be 7 November, but she would remain on the payroll until 26 November. In a further letter dated 7 November 2008 Mrs Cutting-Gardner was advised she would be paid for 24.2 hours per week for the weeks ending 15, 22 and 29 November 2008. She was actually paid to 26 November.

[22] Mrs Cutting-Gardner sought initially to argue that she did not receive the notice of termination of employment to which she was entitled, but I did not understand that argument to have been pursued. If the 5 November letter was being relied on, I do not accept it was a letter of termination of employment giving a termination date of 11 November. In terms of the arrangement the parties reached on 6 or 7 November, Mrs Cutting-Gardner was in effect on garden leave until her employment terminated on 26 November. There was no suggestion she should have received a longer period, and accordingly there was no breach of any notice period.

[23] By letter dated 12 November Mrs Cutting-Gardner's advocate raised a personal grievance in respect of the redundancy. It also contained a broad assertion of unfair disadvantage, which I read as being related to the circumstances of the redundancy. In a letter dated 13 November, which apparently crossed in the mail with

the 12 November letter, Mr Richdale asked for a further meeting to address any outstanding concerns.

[24] No further meeting occurred and the statement of problem was filed in the Authority on 26 November 2008.

The justification for the dismissal

[25] A dismissal on the ground of redundancy can be found unjustified if the redundancy was not based on genuine grounds. Here Mrs Cutting-Gardner says the redundancy was not genuine because it masked BMC's wish to get rid of her.

[26] In support Mr Faidley submitted there was no evidence of a fiscal test being applied to determine if the position was superfluous to requirements. However no such test was necessary here. Redundancies may follow advice that cost savings are necessary and that a reduction in the cost of employing staff (in the form of redundancy) is necessary to achieve the saving. The genuineness of the decision might be tested with reference to the employer's financial circumstances. However positions can become superfluous to an employer's needs on other grounds. Here the matter was not driven by a wish to save costs, although it was open to BMC to conclude that Mrs Cutting-Gardner's suggested alternatives imposed an unacceptable cost burden and that Ms Collis should not continue to be involved in the business to the extent that she was. The primary driver here was the reorganisation of the company, leading to an enhancement of the administrative duties required and the need for a full time position.

[27] I do not accept the enhanced duties were deliberately set at a level BMC knew Mrs Cutting-Gardner could not reach. It was embarking on a significant new direction. It was entitled, even obliged, to seek to strengthen its accounting practices as a first step and it was entitled to employ someone capable of achieving that. The level was higher than was required in the existing role, and the reality was Mrs Cutting-Gardner would be unlikely to be able to reach it without very extensive and unreasonably costly assistance. However the level was not set deliberately with that in mind.

[28] The position was a new and different position. It is relevant that the position was full-time rather than part-time since hours of work are a fundamental term of employment, and I do not accept the submission that differentiating between full time and part time is not a reasonable test. In addition although the position incorporated most of the duties in Mrs Cutting-Gardner's disestablished part time position, it included many of the clerical-level activities Ms Collis had been carrying out as well as other higher-level accounting duties of a clerical nature. The duties had materially changed. The part time position was genuinely redundant.

[29] I do not accept the submission that Mrs Cutting-Gardner should have been given an opportunity to develop skills that would equip her for the new position. She did not have the necessary skills and the employer was entitled to seek to recruit someone who did. I do not accept a submission that the facts are comparable to those in **Harris v Charter Trucks Ltd**.[1]

[30] I turn next to the procedure used in effecting the redundancy.

[31] BMC had advertised the new position before meeting with Mrs Cutting-Gardner to discuss alternatives. It should not have done so without at least confirming with Mrs Cutting-Gardner whether she had any further comment. At the same time Mrs Cutting-Gardner should have responded more promptly than she did to the request for a meeting, even if to do no more than inform BMC that she was attempting to secure the services of another advisor.

[32] This miscommunication caused Mrs Cutting-Gardner to become confused. She said the indication in the 9 October letter was that her position could become redundant, yet the move to recruit for the new position without further discussion indicated the redundancy had become more of a certainty than a possibility. Even so, no appointment had been made to the new position and her own employment had not been terminated by the time the meeting went ahead. She had an opportunity to make suggestions, and there were reasonable grounds for BMC's conclusion that the suggestions were not suitable for implementation.

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[1] [2007] NZEmpC 169.

[33] For those reasons, although the move to advertise the position may have been premature in that no meeting had yet been held with Mrs Cutting-Gardner, I do not regard the matter as a flaw sufficient to vitiate the dismissal.

[34] I do not accept the submission to the effect that the letter of 5 November was a letter of termination of employment with only two days' notice. The letter says Mrs Cutting-Gardner's position will be disestablished on the date given in the letter, but not that her employment will end on that date. The two are not necessarily the same and there is nothing contradictory or improper about that.

[35] The letter invites negotiation of a mutually acceptable separation agreement, and even sets out a starting point for negotiations. As a matter of practice the date of termination of employment is a likely topic for discussion in such negotiations - particularly since no date is given in the letter - and indeed an arrangement regarding the date of termination was made a day or two later. It is unfortunate that, it appears, no meeting of the kind anticipated in the letter went ahead.

[36] There was much debate about what Mr Richdale meant by his comment in evidence that he had 'shot himself in the foot' in respect of this aspect of the procedure. For my part I find that he erred in not proceeding to have a meeting of the kind anticipated in the letter, and instead simply arranging a termination date directly with Mrs Cutting-Gardner. I regard this as a significant error.

[37] Overall I conclude that while the redundancy was genuine, the act of terminating Mrs Cutting-Gardner's employment occurred in association with the discussions following the 5 November letter. That act was unjustified because of its essentially peremptory nature and its failure to follow the procedure indicated in the 5 November letter. For that reason I find Mrs Cutting-Gardner has a personal grievance on the ground of her unjustified dismissal.

Remedies

[38] Reinstatement was sought in submissions, and in the face of an express disclaimer in the statement of problem of any wish for reinstatement. It is not appropriate to request reinstatement - or raise any new matter – in submissions at the

end of an investigation. Reinstatement is a significant remedy which should be sought on notice, and usually requires evidence and discussion.

[39] There was, nevertheless, some relevant material available. The disclaimer of any wish for reinstatement included an assertion that the employment relationship would be strained to the point of being ineffective or worse if reinstatement occurred. Such disclaimer is likely to raise a serious question about practicability if reinstatement is later sought. Moreover, the view of Mr Richdale which Mrs Cutting-Gardner expressed in evidence also suggested that the parties' relationship was such that reinstatement would not be practicable.

[40] In addition, by reason of the redundancy there is now no position to which Mrs Cutting-Gardner can be reinstated.

[41] For these reasons reinstatement is not practicable and is declined.

[42] Mrs Cutting-Gardner also seeks the reimbursement of income lost as a result of her personal grievance. However her employment would have been terminated on the ground of redundancy even in the absence of the flaw discussed above. Her actual loss of income flows from the fact of the redundancy and not from the procedural flaw giving rise to the personal grievance. I therefore make no order for the reimbursement of lost remuneration.

[43] Finally Mrs Cutting-Gardner seeks compensation for the injury to her feelings arising out of the personal grievance. Again, the entitlement to compensation does not flow from the fact of a genuine redundancy which would have occurred anyway, but from the procedural flaw which gave rise to the personal grievance. That is, the way in which the employment was terminated following the 5 November letter. Since much of the actual injury to feelings flowed from the fact of the redundancy, that injury cannot be the subject of compensation for the personal grievance. The injury occasioned by the events immediately after 5 November provides the basis on which an award of compensation can be made.

[44] In that respect BMC is ordered to pay to Mrs Cutting-Gardner the sum of $2,500 under s 123(1)(c)(i) of the Employment Relations Act 2000.

Misleading and deceptive conduct

[45] A number of allegations of misleading and deceptive conduct on BMC's part were made in support of the argument that the company breached its obligation of good faith. Several allegations concerned errors and inconsistencies in the recording of dates and timeframes, and referred to confusion over the contents of BMC's letters of 9 and 20 October and 5 November.

[46] The mere fact that Mrs Cutting-Gardner felt confused or misled, is not in itself sufficient to establish a breach of good faith. In particular I accept there were numerous errors and inconsistencies in the recording of dates and timeframes. I would say these errors were particularly careless, but they were no more than that and did not amount to breaches of good faith. Regarding the correspondence, while the October correspondence was associated with certain procedural flaws, I do not regard the content as misleading in the sense that it amounted to a breach of good faith. The 5 November letter was simply misunderstood.

[47] There was also an allegation that the invitation to Mrs Cutting-Gardner to apply for the new position was not genuine. I do not accept that submission on the facts.

[48] Finally, there was a concern that Mrs Cutting-Gardner was allegedly told she would be offered the new position if the successful applicant declined it, with that statement being made in the knowledge that the applicant had already accepted the position. Even if that account is accurate, I do not consider the allegation of breach of good faith has substance.

[49] For these reasons I find there was no breach of good faith.

Failure to provide a written employment agreement

[50] The remedy available for a failure to provide a written employment agreement is a penalty under s 63A(3), 133 and 135 of the Employment Relations Act. The Authority does not have the power to initiate the recovery of a penalty of its own

motion, and there is a time limit in s 135(5). No party has request an order for the payment of a penalty.

[51] In the absence of any request for a penalty I make no order. I note, however, that Mrs Cutting-Gardner had prepared and signed her own written employment agreement, which was filed with the statement of problem. The agreement set out the agreed arrangements specific to her position, and incorporated standard terms and conditions already in existence.

Costs

[52] Costs are reserved.

[53] The parties are invited to agree on the matter. If they seek a determination from the Authority the party seeking an award shall have 28 days from the date of this determination in which to file and serve a memorandum setting out what is sought and why. The other party shall have a further 14 days in which to file and serve a memorandum in reply.

R A Monaghan
Member of the Employment Relations Authority