

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 582
3051696

BETWEEN LESLEY CUTTLE
 Applicant

AND SOLUTION DYNAMICS
 LIMITED
 Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Dean Organ, for the Applicant
 Aaron Lloyd, counsel the Respondent

Investigation Meeting: 1, 2, 3 and 8 August 2019

Submissions and further 16 August 2019 from the Applicant
Information Received: 16 August 2019 from the Respondent

Date of Determination: 11 October 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Solution Dynamics Limited (SDL) handles physical and digital mail delivery on behalf of its clients. Lesley Cuttle commenced employment with SDL on 29 October 2013 as a Product Manager. In November 2018 her position was made redundant. By this time she was performing a dual role as a Senior Account Manager/Product Manager.

[2] Ms Cuttle claims her dismissal was unjustified because there was no genuine reason for her position to be made redundant and the process followed by SDL was flawed. She further claims that SDL failed to comply with its statutory duty of good faith.

[3] SDL denies Ms Cuttle's claim. It maintains that she was not unjustifiably dismissed and that her employment was terminated by way of redundancy following a restructure. That restructure, it pleads, was justified due to the loss of a number of major customers that had caused significant financial loss. This led to a need for SDL to streamline its operations and reduce costs moving forward. It maintains its decision was made following a fair process and consultation and that it acted in good faith towards Ms Cuttle throughout her employment.

[4] 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 but has not recorded all evidence and submissions received.

The Issues

[5] The issues identified for investigation and determination are:

- a. Was Ms Cuttle unjustifiably dismissed?
- b. If Ms Cuttle was unjustifiably dismissed what remedies should be awarded?
- c. If any remedies are awarded, should they be reduced under s124 of the Act for blameworthy conduct by Ms Cuttle that contributed to the situation giving rise to her grievance?
- d. Did Solution Dynamics breach their duty of good faith? If so, what penalty (if any) ought to be ordered?

Background

[6] In early 2018 SDL became aware that it was going to lose two of its major clients and possibly a third. I shall refer to these clients by their first initial namely Client E, Client W, and Client B. Formal notice of the loss of these customers was received in or about June (Client E), September (Client W) and October 2018 (Client B) with business reducing from that time, and finally ceasing, between late 2018 and early 2019. In addition, in July 2018, SDL became aware that it was likely to suffer additional lost revenue due to price changes being implemented by NZ Post.

[7] In anticipation of the lost revenue, in August 2018, SDL undertook a restructure of the sales function within its business. This restructure included SDL's account managers. Ms Cuttle's role was not affected by this restructure but the account manager who managed Client B's account was made redundant.

[8] On 30 October 2018, SDL issued a proposal to restructure other areas of its business to streamline its operations and reduce costs moving forward. This included those employees who were involved with supporting account managers and those with dual roles. Ms Cuttle was one of those identified as being affected by the proposal.

[9] On 1 November 2018, Ms Cuttle met with the sales manager, Lynda Fish, for an informal catch-up. Ms Cuttle said that during that meeting she was informed that SDL was going to disestablish her role because the SDL Post product was no longer viable. She was told that others in the business would pick up her role. Ms Fish said she could not recall whether she told Ms Cuttle that her role was being disestablished or whether there was a proposal to disestablish. She said she took no notes.

[10] The following day, Ms Fish emailed Ms Cuttle a formal restructure proposal document. This advised SDL was considering making changes to its operations, finance, sales, software and service departments and indicated that the "proposed structure sees the potential merger/dissolution of some roles and the relocation of some tasks to other departments". The proposal also set out the background and rationale for the restructure citing the substantial loss of sales and a need to make changes to respond to changing client demands.

[11] The proposal was accompanied by an email that provided:

The proposal in relation to your position:

Your position was created to manage SDLPost as a Product Manager, as the business has decided that SDLPost is no longer a viable product the proposal is to disestablish your position.

We believe that many of the tasks which are currently performed by your role could be undertaken by others and we could allocate all remaining functions to existing positions within the business.

[12] Ms Cuttle said she was confused when she received this email and consultation document. She understood that the decision to disestablish her position had already been made based on what she had been told by Ms Fish during their catch-up on 3 November 2018. She reiterated this understanding in the feedback that

she provided to SDL on 5 November in support of maintaining a role with SDL. Ms Fish confirmed, in response to questioning from the Authority, that she did not correct Ms Cuttle's understanding that the decision had already been made that her role would be disestablished.

[13] On 8 November 2018 Ms Fish and Ms Cuttle met to discuss Ms Cuttle's feedback. No notes were taken by Ms Fish. Ms Cuttle said that although the purpose of the meeting was to discuss her feedback, this did not occur. Ms Fish disagreed. She said that during the meeting Ms Cuttle talked about her strengths and explained why SDL should continue to employ her. She said it was this discussion that led her to make the offer of an alternative role on 15 November.

[14] Thereafter, sometime in the week commencing 12 November 2018, Ms Fish told the two support officers who were part of the restructure process with Ms Cuttle, that their roles were safe. No notes of these discussions were provided by SDL.

Parties meet to discuss redeployment options

[15] On 15 November Ms Cuttle and Ms Fish met again. What was discussed at that meeting is in dispute. I am satisfied that during that meeting Ms Cuttle was offered an alternative part-time role. Ms Fish advised her that if she did not accept that role, and they could not find another suitable alternative, then her employment would be terminated. Ms Fish took no notes of this meeting but a letter sent to Ms Cuttle later that day confirmed that these matters had been addressed at the meeting.

[16] On 19 November Ms Cuttle wrote to Ms Fish declining the offer of an alternative role. Thereafter Ms Fish wrote to Nelson Siva, SDL's Executive Director and CEO, setting out, amongst other things:

- a. Ms Fish would not negotiate on the remuneration offer that she had made to Ms Cuttle as that would mean she needed to lose two staff. If this occurred "then the 3 of us remaining would not cope as Lesley can't manage the day to day jobs and has to have a BA with her everywhere she goes".
- b. Alternatives to redundancy for example: to make one of two of the support officers redundant "even though I have said they are safe (risk a PG) and then to ask the CSR team which one would like to take voluntary

redundancy (so LC can be retained – maybe [name withheld] will volunteer).”

[17] Mr Siva orally responded advising Ms Fish to carry on with making Ms Cuttle’s position redundant. Ms Fish said he told her there was “no point going down the track with the other two [the support officers] because they weren’t involved with postage”. Ms Fish said, based on these instructions, she did not explore the alternatives to redundancy that she had proposed in her email to Mr Siva.

[18] On 22 November 2018, Ms Fish and Mark Wootton (Chief Operating Officer) met with Ms Cuttle to discuss Ms Cuttle’s rejection of the redeployment offer and to provide Ms Cuttle with a confirmation letter confirming her position had been made redundant. During this meeting it became clear that Ms Cuttle was unclear what the alternative role entailed. It was agreed that the parties would meet again on 26 November 2018.

[19] On 26 November 2018 Ms Cuttle and Ms Fish met. Ms Fish advised that she had no additional details of the role other than that presented previously, and had no other solutions. She indicated she thought the redeployment offer was a good compromise.

[20] On 27 November 2018, Ms Cuttle emailed Ms Fish reiterating that she did not wish to accept the alternative role. Following receipt of this email they met for a cup of tea during which they discussed Ms Cuttle’s notice period. It was agreed that Ms Cuttle would come back to Ms Fish that week with her proposed termination date.

[21] On 28 November 2018 Ms Cuttle emailed Ms Fish to advise that her last day would be 20 January 2019. Ms Fish responded saying she had spoken to Mr Siva and would catch up with her later that day. She did not do so.

[22] By 12.30 pm on the 29th of November Ms Cuttle had still not heard from Ms Fish despite sending her an email asking when they were to catch up. She approached Ms Fish’s desk and they went into a meeting room. Ms Fish informed Ms Cuttle that SDL did not agree with her finishing on 20 January 2019. She said that her notice period had started on 27 November 2018 when she rejected the redeployment offer. She then handed her a termination letter. This letter provided the option of Ms Cuttle either working out her notice period or being paid in lieu. Ms Fish told Ms Cuttle that

Mr Siva had agreed to pay out her notice period and discussed the amount that would be paid using a calculation table she had with her.

[23] There is a dispute about what transpired after this meeting in terms of the destruction of documentation and the deletion of emails and/or customer files by Ms Cuttle. This is a matter that will be examined at the next investigation meeting. In terms of other events that afternoon I am satisfied, having reviewed the documentary evidence and the CCTV footage, that the following transpired:

- a. At 2.20 pm Ms Cuttle told Ms Fish that she would be leaving that afternoon.
- b. Upon receipt of this email Ms Fish emailed the IT department asking it to lock Ms Cuttle's computer from 4 pm being the time she understood Ms Cuttle normally finished for the day.
- c. At 4.21 pm Ms Fish emailed Ms Cuttle advising that she was to leave her phone and other company items with her before she left that day.
- d. Ms Cuttle did not receive that email. Upon leaving the office she provided her credit card, fuel card and swipe card to her support person.
- e. After Ms Cuttle left the office, Ms Fish collected her laptop from her desk and took this to the IT Department.
- f. Thereafter Ms Cuttle returned to the office as she had forgotten something. At this time she was informed by her support person that Ms Fish wanted her to return her phone that day.
- g. Ms Cuttle went to the IT Department and spoke with Ms Fish. She advised Ms Fish that she would like to have time to remove her personal photos and family contacts from the phone. Ms Fish advised Ms Cuttle that she could not leave with her contacts and/or the phone. After a period of time SDL provided an old phone to Ms Fish and loaded her photos and contacts onto this phone.

[24] On 30 November 2018 Ms Cuttle was paid all monies SDL considered were owing to her, excluding commission, for the period up to and including 26 December 2018.

Issue One: Was Ms Cuttle unjustifiably dismissed?

[25] In order for Ms Cuttle's redundancy to be justified, SDL must satisfy the requirements set out in s 103A of the Act. This requires an objective assessment of whether SDL's actions, and how it acted, were what a fair and reasonable employer could do in all the circumstances at the time the dismissal occurred.

[26] To ensure that a redundancy process is procedurally fair, employers must ensure they comply with their good faith obligations contained in s 4 of the Act. In accordance with these obligations, affected employees should be provided with access to information relevant to the continuation of the employee's employment and an opportunity to comment on that information before it makes its final decision. This includes details as to what the criteria for selection for redundancy are and the weight to be applied to those criteria.¹

[27] An employer is only entitled to terminate an employment agreement due to redundancy if the termination can be genuinely justified on the basis of valid commercial reasons.

The Process followed by SDL was flawed

[28] I am satisfied the test of justification has not been satisfied. There were a number of serious defects in the process followed by SDL that resulted in Ms Cuttle being treated unfairly in terms of s 103A(5) of the Act. These defects were not minor and did result in Ms Cuttle being treated unfairly. I set out several examples below.

SDL breached its good faith obligations

[29] First, SDL failed to satisfy the requirements of good faith set out in s 4(1A)(c) of the Act. Ms Cuttle was not provided with information relevant to the continuation of her employment, and an opportunity to respond, before SDL decided to disestablish her position. I agree with the Court in *EDS (NZ) v Shaddox* where Chief Judge Goddard said:²

In a situation in which the employer is legally obliged to consult or to hear employees before taking action against them to the detriment of their security of employment, it can never be an answer to say that it would have made no difference. As has frequently been observed, one cannot tell what may not

¹ *Jinkinson v Oceania Gold* [2010] NZEmpC 102 at [51].

² *EDS (NZ) v Shaddox*, 1 ERNZ 497 at 502 at paragraph 18.

have happened if Mr Shaddox had been told what was on the table, given an opportunity to address it, and been listened to with open minds.

[30] I am fortified in this finding by the following matters:

- a. *Selection criteria* - Ms Fish prepared an assessment matrix (the matrix) that listed a number of key skills and knowledge that SDL required of its staff. Ms Fish then used a grading system to grade each employee that had been identified for redundancy, as well as the three account managers that SDL maintains were part of the earlier restructure. Ms Cuttle was scored second to last. Miss Fish acknowledged that the matrix was one of the tools used by SDL to decide who would be made redundant. Neither the Matrix, nor the selection criteria used for selecting who would be made redundant, were provided to Ms Cuttle for her to comment on.
- b. *Performance concerns* - During the course of the restructure Ms Fish made notes on the Matrix that included issues about Ms Cuttle's performance and abilities. These concerns were reiterated in email correspondence exchanged between Ms Fish and Mr Siva during the restructure. I am satisfied these concerns were a factor that were taken into account by SDL when deciding to disestablish Ms Cuttle's role. These concerns were not put to Ms Cuttle either before or during the restructure process so as to provide her with an opportunity to address and, if possible, correct the allegations so they did not unfairly affect the outcome.
- c. *Financial Information* - The restructure of SDL's business was said to be necessary because of a loss of sales. These losses led to SDL deciding it needed to streamline its operations and reduce costs moving forward. Mr Wootton's evidence was that this decision was made following his preparation and presentation of financial information to SDL's Board. He said, following receipt of this information, the Board made the decision that cost savings needed to occur including redundancies. SDL failed to provide Ms Cuttle with the financial information upon which it relied when making the decision to disestablish her role.
- d. *The viability of SDL Post* - A key component of the decision made by SDL to disestablish Ms Cuttle's role was that it no longer considered SDL Post to be a viable product. Mr Wootton said he understood this was because

the price changes made by NZ Post had led to a reduction in the profit margin generated by SDL and an anticipated loss of around \$400,000. Ms Cuttle was not told this was the case, nor provided with any financial information relied upon by SDL, in order to comment. Nor was she advised of SDL's intention to amalgamate the SDL Post position, excluding high level attendances such as contract preparation, with the Production Manager's role also denying her the opportunity to comment.

Inadequate consultation

[31] Second, I was not persuaded that SDL adequately consulted with Ms Cuttle before making its decision to disestablish her role.

[32] The key requirements of consultation were summarised by Judge Inglis in *Stormont v Peddle Thorp Aitken Limited*³

Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done. Consultation must be a reality, not a charade. Employees must know what is proposed before they can be expected to give their view on it. This requires the provision of sufficiently precise information, in a timely manner. The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.

[33] Not only did SDL fail to provide Ms Cuttle with sufficiently precise information to enable her to respond, its actions are consistent with a finding that it approached the redundancy with a closed mind.

[34] While I acknowledge SDL's correspondence to Ms Cuttle on 3 November stated that the disestablishment of her role was a "proposal", SDL's actions, its oral communications with Ms Cuttle, and the communications between Ms Fish and Mr Siva support a finding that the decision had already been made by this time. For example:

- a. Ms Fish advised Ms Cuttle on 1 November that her role was disestablished. This was prior to any consultation process being undertaken. While Ms Fish could not recall if she said they had decided to disestablish the role, or proposed to disestablish the role, Ms Cuttle's memory was clear that she was told that her role had been disestablished.

³ [2017] NZEmpC 71 at [54]

Her evidence was supported by the feedback letter she sent shortly thereafter that confirmed this was what she had been told. Ms Fish accepted that she had seen that statement and had not corrected Ms Cuttle's understanding that her role had been disestablished.

- b. It is more likely than not that SDL adjusted Ms Cuttle's workload in anticipation of the disestablishment of her role. For example, it removed one of Ms Cuttle's major clients from her portfolio - SOE. According to Mr Wootton, this client equated to quarter of Lesley's role. This was done without consultation. It then allocated a new client to Ms Cuttle's portfolio in late September 2018 that it knew was not going to be renewing its contract with SDL.
- c. Email communications between Ms Fish and Mr Siva on 6 November, prior to feedback being obtained from Ms Cuttle, show Mr Siva asking Ms Fish "When will all be finalised. I have a meeting with SOE this Friday, and would like to advise them." Ms Fish then enquired whether he meant in relation to Lesley's role or just postage. He responded "Completion of all restructure actions, including Lesley's role."
- d. Ms Fish took no notes during her meetings with Ms Cuttle, whereas she said she took notes during meetings with staff during the earlier restructure and with other staff during the second restructure.

No evidence to support a genuine reason for the redundancy

[35] For completeness I also record my findings in terms of the genuineness of SDL's decision.

[36] In *Michael Rittson-Thomas t/a Totara Hills Farm v Hamish Davidson*, Chief Judge Colgan stated:

It will be insufficient under s 103A, where an employer is challenged to justify a dismissal or disadvantage in employment, for the employer to simply say that this was a genuine business decision and the Court (or Authority) is not entitled to inquire into the merits of it. The Court (or the Authority) will need to do so to determine whether the decision, and how it was reached, were what a fair and reasonable employer would/could have done in all the relevant circumstances. Therefore while it is still true that the Court cannot substitute in its own judgment, s 103A does require the Court to assess what the fair and reasonable employer could (previously would) have done in the circumstances.

[37] By minute dated 17 April 2019, the Authority directed SDL to provide a copy of all documents it relied upon when making its decision to restructure, including copies of financial documentation evidencing the alleged loss of business and evidence of the alleged loss of customers.

[38] Despite the Authority's direction, and a reminder issued on 17 July 2019, SDL did not provide any financial documentation supporting its decision to restructure. No documentation was provided evidencing the quantum of sales it had lost, or that were forecasted to be lost, at the time of the restructure. Nor was any documentation disclosed that evidenced the effect that the NZ Post price increase had on SDL's profit margin or sales or the cost savings that SDL achieved through the disestablishment of Ms Cuttle's role.

[39] Evidence from SDL's witnesses was sparse.

[40] Mr Wooton's witness statement deposed that SDL had lost major clients in mid-late 2018, that he identified, that had resulted in substantial financial loss of \$1,979,573 for SDL but provided no other information. Ms Fish's written evidence was to the effect that SDL had lost revenue of approximately \$1.6 million as a result of the loss of clients. However, under questioning, she said she was not aware of any specifics in terms of losses suffered by SDL as she wasn't "a party to financial discussions". She said these were "above my pay grade" but thought the losses may have been around this sum based on her review of monthly reports.

[41] Neither witness knew what cost savings were achieved by SDL by making Ms Cuttle's position redundant. Nor were they aware what losses had been, or were forecast to be, suffered as a result of the NZ Post price increases at the time the restructure took place. Although Mr Wooton thought these may have been around \$400,000.

[42] In the circumstances, taking into account the lack of documentary evidence provided to both Ms Cuttle during the consultation process, and to the Authority in accordance with its direction, and the limited knowledge of the witnesses who appeared for SDL, I am unable to conclude that Ms Cuttle's redundancy was genuine.

Finding on issue one

[43] I am satisfied that SDL's decision to terminate Ms Cuttle's employment did not fall within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time. I find SDL's decision to terminate Ms Cuttle's position on the grounds of redundancy was unjustified.

Issue Two: Remedies

[44] SDL maintains that, following Ms Cuttle's departure, it discovered that Ms Cuttle had deleted a significant number of work-related emails and destroyed physical copies of documents including customer and supplier agreements. This allegation forms part of a counterclaim filed by SDL that includes a claim that Ms Cuttle breached the terms of her employment agreement and her common law duty of fidelity. SDL maintains that Ms Cuttle's behaviour was egregious and asks the Authority to take this alleged conduct into account when setting remedies.

[45] In *Salt v Fell* the Court of Appeal considered the issue of subsequently discovered misconduct and circumstances where the Authority or the Court might conclude that it should not award any remedies to an Applicant notwithstanding a successful finding of a personal grievance.⁴ The majority favoured the view that such conduct was relevant to whether remedies should be granted at all under the discretionary provisions of s 123. It found that subsequently discovered misconduct of a truly significant nature can be taken into account when determining remedies under s 123 itself. That section confers "remedies in broad discretionary terms".

[83] Subsequently discovered misconduct of a truly significant nature can be taken into account when determining remedies *under s 123 itself*. That section, as this Court said of its predecessor, confers "remedies in broad discretionary terms" (see *Ark Aviation Ltd v Newton* (2001) 1 NZELR 337 at para [35]). The Employment Court was required to exercise this "broad discretionary" power as "equity and good conscience" dictated (see s 189(1)). Powers are to be exercised "for the purpose of supporting successful employment relationships and promoting good faith behaviour".

[46] In *Xtreme Dining Ltd t/a Think Steel v Dewar* a full bench of the Employment Court affirmed the conclusion reached in *Salt v Fell* finding:⁵

⁴ *Salt v Fell* [2008] ERNZ 15 at [78]

⁵ [2016] NZEmpC 136.

[216] ... when there is misconduct which is so egregious that no remedy should be given, notwithstanding the establishing of a personal grievance, the Authority or Court may take that factor into account in its s 123 assessment in a manner that conforms with “equity and good conscience”. The absence of a remedy in rare cases, notwithstanding the establishing of a personal grievance may be appropriate. The Court of Appeal reached this conclusion where there is disgraceful misconduct discovered after a dismissal. We consider that the statutory scheme allows for the same outcome in other instances where, for example, there has been outrageous or particularly egregious employee misconduct.

[47] At present the Authority is unable to investigate the allegations of egregious behaviour or SDL’s counterclaim. This is because of a parallel proceeding in the criminal court that involves similar or the same subject matter. I was told by Mr Lloyd that the Police have directed that SDL not disclose particular documents to Ms Cuttle. This has placed SDL in the difficult position of being unable to pursue its counterclaim and its defence in terms of remedies. In addition, Ms Cuttle, while denying the allegations in a general way, has exercised her right to silence.

[48] In the circumstances, and with the parties’ agreement, I reserve the issue of remedies arising out of the unjustified dismissal pending the hearing of SDL’s counterclaim. I will address the timing of this later in this determination.

Progression of Counterclaim and other aspects of the Applicant’s claim

[49] During the course of the investigation meeting Ms Cuttle sought leave, with SDL’s consent, to amend her claim to include a claim for wage arrears relating to her notice period. This was granted.

[50] The parties have agreed that this claim, as well as Ms Cuttle’s claim for breach of good faith and remedies for her unjustified dismissal will be addressed with the counterclaim.

[51] By agreement the progression of the counterclaim will await the District Court’s decision in the criminal matters progressing against Ms Cuttle. Ms Cuttle has agreed to keep the Authority informed of progression of this matter so that an investigation meeting can be set down as soon as practical.

Costs

[52] Costs are reserved for determination following the hearing of the Counterclaim. In the meantime, for the avoidance of doubt, I record this investigation meeting took place over 4 days. However, the meetings finished early on some days and only extended into a quarter day on the fourth day. As such the starting point for any future determination on costs will be 3 days.

Outcome

[53] The overall outcome that I have reached is:

- a. Ms Cuttle was unjustifiably dismissed from her employment with SDL.
- b. The following matters are reserved:
 - i. Remedies relating to Ms Cuttle's unjustified dismissal and all other pleaded claims;
 - ii. SDL's counterclaim;
 - iii. Costs

Jenni-Maree Trotman
Member of the Employment Relations Authority