

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Nichola Claire Donovan (Applicant)
AND Tourism West Coast Inc (Respondent)
REPRESENTATIVES Robert Donovan, Counsel for Applicant
Andrew Shaw, Counsel for Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 15 June 2006
DATE OF DETERMINATION 8 September 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Tourism West Coast Incorporated is an incorporated society and is a regional tourism organisation for the West Coast. It is governed by a board and employs several staff to help achieve its objectives as defined in its constitution. Nichola Donovan worked for TWC from 2001 until her employment was terminated in October 2005. TWC says that it justifiably terminated Ms Donovan's employment as a result of a genuine redundancy situation. Ms Donovan questions whether she was dismissed for some undisclosed reason and whether TWC terminated her employment in a procedurally unfair manner.

[2] It is accepted that Ms Donovan performed her work to a high standard during her employment with TWC. By the time of the dismissal, Ms Donovan was working as TWC's marketing manager. There were two other employees. Wendy Martyn initially worked part-time as an administrator and an assistant to the chief executive officer. Her position was increased to full-time to incorporate a marketing co-ordinator function around the end of May 2005. Greg Howe was employed full-time as the chief executive officer and both Ms Donovan and Ms Martyn reported to him.

[3] It must be remembered that a loyal and hard-working employee may be justifiably dismissed as redundant without having done anything wrong: see for example the comment of Richardson J in *Aoraki Corporation Ltd v McGavin* [1998] 1 ERNZ 601 at 618 distinguishing redundancy from dismissals for cause. The task for the Authority is to consider whether there was a genuine redundancy situation fairly handled in accordance with the terms of the employment agreement and the Employment Relations Act 2000. Ms Donovan's employment agreement provided:

15. REDUNDANCY

- (a) *The Employee shall be regarded as redundant when the position held by the Employee becomes surplus to the requirements of the Employer or is otherwise disestablished as a result of the closing down of all or part of the Employer's*

business or a reduction in work available or as a result of any other genuine business decision of the Employer.

- (b) *If the Employee's employment is terminated on account of redundancy, the Employee shall be entitled to notice of that termination or payment in lieu of that notice but shall not be entitled to any compensation on account of redundancy*
- (c) ...

[4] It is necessary to explain the situation said by TWC to have caused its decision to make Ms Donovan's position surplus, decide whether it falls within the circumstances described in clause 15 (a) of the employment agreement and whether the process by which TWC made and implemented its decision meets the test for justification set out at section 103A of the Act.

The financial situation

[5] The Board meetings are usually open to the public. Minutes are circulated to contributing local government agencies and subject to the obligations of those agencies about public disclosure. Accordingly, a Board meeting often includes a section during which the public are excluded to enable the Board to deal with issues which it decides should not be made public at that time. The public was excluded during part of the Board meeting held on 14 September 2005. There are also minutes of that part of the meeting which I accept are an accurate record. There was discussion about reduced funding having an effect on TWC activities in the coming year and about the budget for the year 1 July 2005 to 30 June 2006. The budget at that time projected a substantial deficit of over \$100,000.00 compared with a deficit of \$17,081.00 shown in the accounts for the year ended 30 June 2005 which were then in the process of being audited.

[6] There was an extra-ordinary meeting of the Board on 2 October 2005. Again, I accept the minutes are accurate. Greg Howe was present for the discussion *regarding financial pressures 2005-2006* but was excluded for about 20 minutes during which the Board resolved *That as part of the process the board resolves all staff should be informed immediately of current financial position and possibility of restructuring* and *The board asks that the chairman and one other board member (Mrs B Duckett) meet with staff as soon as practicable.*

[7] Next morning, Mr Howe sent an email to staff asking them to be available for a meeting at 10.00 am on Tuesday 4 October 2005 *...to discuss the 2005/6 budget.* The chairman (Tony Williams) and another Board member (Barbara Duckett) attended this meeting and briefed staff about the situation. There is an email dated 7 October 2005 from Mr Williams circulated to Ms Donovan which she accepted in evidence as an accurate summary of the 4 October 2005 briefing. In particular it reads *Among possible solutions is a restructure of the organisation which may lead to position/s being made redundant and Each individual staff member will be met with separately to discuss individual position descriptions/opinions.* Staff were advised that they could bring a support person to the meeting. Ms Donovan's evidence is to the effect that this was not a novel situation and that budgets were a perennial problem. However, there is no evidence that earlier budget discussions were accompanied by advice of the possibility of redundancy and the right to a support person. I find that there was clear advice to Ms Donovan on 4 October and upon receipt of the email by her on 10 October that her employer was contemplating a redundancy that might affect her.

[8] On Wednesday 12 October Ms Donovan was advised that her individual meeting would be on Friday 14 October. That same day, Ms Martyn asked Ms Donovan for Ms Donovan's work car keys, fuel card and the work camera. I accept that the Board had not requested Ms Martyn to make these requests. On 13 October Ms Donovan sent an email via Ms Martyn to Mr Howe asking for a

copy of the budget but did not receive it until the next day. Ms Donovan also attempted to get legal advice but was not able to obtain any expert advice given the short notice. Ms Donovan decided that she needed to defer the 14 October meeting and phoned Barbara Duckett who was prepared to defer the meeting provided that was also okay with Mr Williams. Ms Donovan attempted to contact Mr Williams but was not able to speak to him until 14 October. When they spoke, Mr Williams said he preferred to proceed with the meeting on an informal basis but told Ms Donovan that she could also have until Monday morning to provide any further comment in writing. In the meantime, Ms Donovan also sought some accountancy advice about the budget but that provided no assistance given the limited information in the budget document.

[9] Ms Donovan gave evidence about petty behaviour towards her by Mr Howe and Ms Martyn. For example, Mr Howe was unhelpful with her request about deferring the 14 October meeting. To some extent, Ms Donovan takes from their behaviour an indication that they knew she was to be made redundant. However, I do not accept that either Mr Howe and Ms Martyn were advantaged by the Board or Ms Donovan was disadvantaged relative to one another. The tension often present in an organisation where redundancy or restructuring is contemplated may well have affected the behaviour of Ms Martyn and Mr Howe but their behaviour does not detract from the way in which the Board handled the situation.

[10] Ms Donovan says that the 14 October 2005 meeting proceeded on a *without prejudice and confidential* basis. I prefer the evidence of Mr Williams and Mrs Duckett that their first discussion about the redundancy situation proceeded on an informal basis with Ms Donovan to supply anything further after the meeting. Thereafter, there was also a discussion at Ms Donovan's initiative where she raised some complaints about Mr Howe's conduct. This discussion was agreed as confidential. It is not necessary to canvass the detail of the discussion. I find that Ms Donovan's comments were not used against her by the Board in its subsequent decision about the redundancy.

[11] Ms Donovan provided the Board with a letter dated 15 October 2005 in which she provides further comment about the budget and the potential redundancy situation. It is apparent from the letter that Ms Donovan understood that her position was at risk of disestablishment. The letter states:

To make the position obsolete is potentially suicidal to TWC's functionality and momentum generated by this position, ...

[12] The Board met by telephone conference on 17 October 2005. There was also a Board meeting in person on 19 October 2005. By the end of that meeting, the Board had decided to reduce its staffing complement from three to two, to disestablish Ms Donovan's position making her redundant, and to divide her responsibilities amongst the two remaining employees. In reaching that decision, it is apparent that the Board was influenced by an email from Mr Howe dated 18 October 2005 in which he recommends dividing work responsibilities between two positions, position A covering administration and sales and position B covering management and marketing. In that same email, Mr Howe says:

The current workplace philosophy has been one of trust and integrity. Unfortunately this philosophy has been taken advantage of rather than embraced. Blatant disregard of common sense protocol combined with a strategic undermining of the organisation has been costly, from both a financial and industry perspective, and will require the implementation of a number of policies.

*These include, however, are not limited by:
Telephone policy ...*

[13] It is clear enough that Mr Howe was not criticising either himself or Ms Martyn. The reference to *Telephone policy* followed discussion at the Board meeting on 17 October 2005 about Ms Donovan's personal use of TWC's cell phone and a letter from Mr Howe to Ms Donovan asking her to indicate on the current year's phone bills which calls related to her personal use.

[14] On 19 October 2005 at the Board's request, Mr Howe sent an email to Ms Martyn and Ms Donovan asking them to be available next morning for a meeting with Mr Williams and another Board member. Ms Donovan saw the email when she arrived at work on 20 October 2005. The Board members met with Ms Martyn and Ms Donovan individually. Ms Donovan was told of the decision to disestablish her position and to make her redundant, to pay her in lieu of notice and to pay her an extra four weeks salary despite there being no contractual obligation to do that. Counselling was offered. A little later the same day, Ms Donovan received a letter confirming these details. The letter also asked Ms Donovan to return all TWC property by Tuesday 25 October 2005.

[15] Later in the afternoon, Ms Donovan packed up her personal belongings. While she was still there, a locksmith arrived to change the office locks. Mr Howe closed down Ms Donovan's computer. Her cell phone, credit card and taxi card were disabled. Ms Donovan left shortly after 5.00 pm. With reference to the locksmith and the computer closedown Ms Donovan's evidence is that she felt like a thief despite her 4 years service. Mr Williams' evidence is that these measures were taken by decision of the Board and reflect the views of some Board members about standard procedure in a redundancy.

Genuine redundancy situation?

[16] Ms Donovan does not accept that there existed a genuine redundancy situation. That is partly reflected in her claim for reinstatement. However, there is no doubt that there was a genuine redundancy situation.

[17] The employment agreement includes a definition of a redundancy situation but that reflects the definition commonly applied in many cases over the years. The Courts have held that an employer is entitled to manage their business in accordance with their business judgement: see for example *Aoraki Corp Ltd v McGavin* [1998] 1 ERNZ 601. For the most part, Ms Donovan's views about the genuineness of the redundancy reflect her view that the decision to reduce from three employees to two or to dispense with the position of marketing manager was unwise or short-sighted. That does not provide a basis for challenging the employer's decision.

[18] I am satisfied that TWC made a genuine decision that Ms Donovan's position was superfluous to its needs in response to the budget deficit disclosed during the budgeting process.

Fair Process?

[19] There is no express provision in the employment agreement governing how any process of consultation in a redundancy situation should be handled. However, TWC did consult with its employees. Section 4 of the Employment Relations Authority required it to consult in good faith. In particular section 4 (1A) requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of an employee's employment to provide access to the relevant information and an opportunity to comment before the decision is made. These are the ordinary expectations on a fair and reasonable employer when consulting over a redundancy situation.

[20] TWC did not comply with this obligation. There was some delay in providing Ms Donovan with the budget information. More seriously, Ms Donovan was not given a copy of Mr Howe's email of 18 October 2005. That email formed the basis on which the Board made its decision to reallocate work from the existing three positions to two positions. It also conveyed a trenchant criticism of Ms Donovan that she had taken advantage of the organisation's philosophy of trust and integrity. Ms Donovan was entitled to an opportunity to respond to both points before a decision was made about the continuation of her employment.

[21] There is also merit in the point made by Ms Donovan that she was made to feel like a thief as a result of the security measures taken on Ms Donovan's last day at work. There was nothing in the circumstances to indicate that Ms Donovan would do anything other than respond in a responsible and lawful manner to the Board's decision to make her redundant. It must be remembered that Ms Donovan had worked for more than 4 years for the organisation based in a close knit community in which her connections go back for several generations.

[22] For these reasons, I find that how the employer acted was not what a fair and reasonable employer would have done in the circumstances. It follows that the decision to dismiss is unjustifiable and Ms Donovan has a personal grievance.

Remedies

[23] There is a submission on behalf of TWC that Ms Donovan contributed to the situation giving rise to the grievance so that any remedies must be reduced: see section 124 of the Employment Relations Act 2000. I reject that. The argument is that Ms Donovan was not adequately prepared for the meeting on 14 October. That is correct as far as it goes but it does not lead to a conclusion that Ms Donovan contributed in a blameworthy way to the situation giving rise to the established grievance.

[24] There is a finding that this was a genuine redundancy situation. Almost inevitably, staffing was going to be reduced from 3 to 2 positions given the budget situation, changing work programme and on-going funding issues. I also accept the point made by counsel for the respondent that this is not a case where the employer selected between several employees doing the same or substantially similar work. The respondent decided for genuine commercial reasons to forego the position of marketing manager held by Ms Donovan. The lost remuneration suffered by Ms Donovan arises from the genuine redundancy situation and Ms Donovan's subsequent choice (albeit with limited options) to establish a business venture rather than seek alternative employment. There can be no compensation for lost remuneration.

[25] Reinstatement is claimed but is not practicable. The position previously held by Ms Donovan no longer exists and was disestablished for genuine commercial reasons. There are currently two positions with TWC but both are filled. Much of the work previously performed by Ms Donovan is no longer done by TWC.

[26] What remains for assessment is compensation for distress. Ms Donovan is obviously indignant about what happened to her. She feels that her sudden and unexpected departure has affected her reputation in the community and that the decision of the Board was disappointing and upsetting. These views are related to the flaws in how TWC made and implemented the decision to make Ms Donovan redundant. To remedy these effects, I order Tourism West Coast Incorporated to pay Ms Donovan \$4,000.00 compensation pursuant to section 123 (1) (c) (i) of the Employment Relations Act 2000.

Summary

[27] Ms Donovan has a personal grievance against Tourism West Coast Incorporated.

[28] Tourism West Coast Incorporated is to pay Ms Donovan \$4,000.00 compensation pursuant to section 123 (1) (c) (i) of the Employment Relations Act 2000.

[29] Costs are reserved. It might be that the only claimable expense is the lodgement fee paid by Ms Donovan. However, if there is any claim for costs, Ms Donovan may lodge a memorandum setting out any details including invoices and receipts and the respondent may lodge any reply within a further 14 days. I will then determine any issue about costs.

Philip Cheyne
Member of Employment Relations Authority