

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 28/09  
5106214

BETWEEN                      LEANNE DUNCAN  
   Applicant  
  
AND                              HARVEYS FLOOR PRIDE  
   LIMITED  
   Respondent

Member of Authority:      Philip Cheyne  
  
Representatives:            Pat Norris, Advocate for Applicant  
   John Levenbach, Counsel for Respondent  
  
Investigation Meeting:    22 October 2008 at Nelson  
  
Determination:              10 March 2009

---

**DETERMINATION OF THE AUTHORITY**

---

[1]      Leanne Duncan worked for Harveys Floor Pride Limited in Nelson from 9 February 2004 until October 2007 when her employment came to an end. Ms Duncan says she was unjustifiably dismissed and challenges whether there existed a genuine redundancy situation, whether the company complied with procedural requirements when terminating her employment and whether it complied with good faith obligations when introducing the new computer software system that preceded the termination of her employment. There is a complaint that the company did not provide her with an individual employment agreement and that it failed to maintain time and wage records properly. Ms Duncan is also critical of HFP's conduct towards her after the employment ended and the way in which it responded to her raising her employment relationship problem.

[2]      There is a comprehensive response from HFP to all these claims. The company says that it restructured its business to make it more efficient which resulted in Ms Duncan's position being surplus to its requirements. It says that it dismissed

Ms Duncan in a fair and reasonable manner due to this redundancy situation. HFP says that it mostly complied with the requirements for an employment agreement to be in writing and fully complied with its obligations regarding time and wage records and good faith.

[3] There are some disputes in the evidence about what happened, when and why. It is necessary to canvass these events and make findings about these disputes before applying the law regarding justification for dismissal to the facts as found. I will start with Ms Duncan's role in the business and the dispute about the employment agreement before canvassing more closely the events leading up to the end of her employment.

[4] While the statement of problem identified the respondent as *Mr Tom Harvey, Harveys Floor Pride*, at an early stage it was agreed that the employer's correct identity is Harveys Floor Pride Limited. Accordingly I made an order by consent identifying the company as the respondent.

### **Ms Duncan's role**

[5] Ms Duncan started work on 9 February 2004. About two months later, she was given a one page document entitled *Job Description – Administrator* to read and she signed this document on 13 April 2004. The document contains bullet points, some in the nature of terms of employment and others in the nature of a job description.

[6] The relevant legal requirements are set out in s.64 (now repealed but applicable at the time) and s.65 of the Employment Relations Act 2000. To summarise s.64, HFP was required to give Ms Duncan a copy of proposed terms of the employment, tell her of her right and give her an opportunity to obtain independent advice. None of that was done. However, there is no claim before the Authority for breach of the Act. The 13 April 2004 document falls short of the requirements in s.65 of the Act because it does not include the wages or salary payable, nor does it have a plain language explanation of the services available for resolving employment relationship problems. The document does not identify the employer's correct name and one is left to infer where the work is to be performed. These failings are not material to Ms Duncan's personal grievance. Accordingly it is not necessary to say any more about this aspect of Ms Duncan's complaint.

[7] HFP sells carpets, vinyl, tiles, rugs, curtains and blinds from its showroom in Nelson. It also measures and quotes for supplying and laying or fitting of these furnishings. Customers deal principally with sales staff. At the time, sales staff gave information to Ms Duncan for her to make up the quotes for the flooring and drapes department and to make up the job sheets for layers and fitters. There were other duties associated with stock records and general office administration that Ms Duncan also performed.

[8] In about August 2007, HFP introduced a new computer software system, having foreshadowed that intention over the previous few months. The system integrated sales, quoting and stock control. It was designed for sales staff to input data and generate their own quotes and job sheets. If fully implemented that way, it meant there might no longer be a need for Ms Duncan's role. HFP continued for some time without any major change to its work processes but eventually decided to change work practices to take better advantage of the new software's functionality.

[9] One of Ms Duncan's complaints is that HFP did not openly and honestly advise her of the full impact of the implementation and operation of the new computer system on her job. Thomas Harvey is HFP's sole director. Ms Duncan says that during meetings with staff about the changes, Mr Harvey gave his word that no one would be made redundant because of the new computer system. Mr Harvey's evidence is that he made this promise. Ms Duncan's complaint about a breach of good faith arises because she was made redundant as a result of the implementation of the new computer system. I will return to this point later.

### **The termination of Ms Duncan's employment**

[10] Leading up to Thursday, 10 October 2007, there were several discussions between Mr Harvey and Ms Duncan about changes to her work. What Mr Harvey sought was for Ms Duncan to shift from her existing work station to a station nearby, swapping with another employee (Rebecca). To that point, Rebecca had been a receptionist with primary responsibility for answering phone calls and attending to anyone who came to the administration area at the back of the showroom. Rebecca also performed general administration work. Her work station was located to facilitate the reception role. Mr Harvey wanted Ms Duncan to assume primary responsibility for the duties hitherto performed by Rebecca and for Rebecca to handle

quotes and sales administration especially for the mobile salesperson as well as other general administration duties using Ms Duncan's former work station.

[11] Ms Duncan was resistant to this change for two reasons. First, since the installation of the new system, most of Ms Duncan's work had not changed as HFP did not press to implement transferring quoting from her to the sales staff. However, about two weeks before 10 October, Ms Duncan heard from a salesperson that there had been a discussion between him and Mr Harvey about getting him a laptop to do his own quotes. When Ms Duncan challenged Mr Harvey about this, he denied it but Ms Duncan did not believe his denials. Hence Ms Duncan was suspicious about HFP's motives for wanting her to relocate. More importantly, Ms Duncan saw changing work stations and tasks as a demotion to the position of receptionist. She saw this as a backward step.

[12] Mr Harvey persisted with attempts to get Ms Duncan to agree to the changes while Ms Duncan remained obdurate. In her evidence Ms Duncan criticises Mr Harvey for badgering her about this but I do not consider there was anything improper in his attempts to gain her agreement to change.

[13] Rebecca was on holiday for a time in the middle of these discussions. Ms Duncan helped to cover her duties during her absence as had always been the case. The day Rebecca returned from holiday, Mr Harvey again spoke to Ms Duncan about the change in duties and about swapping work stations. Ms Duncan reacted belligerently and told Mr Harvey that she would not *do the fucking mail*. Given Ms Duncan's response, Mr Harvey arranged for HFP's general manager (Dean Folly) to progress the matter with Ms Duncan.

[14] Both Mr Folly and Ms Duncan agree that they had a discussion following which Mr Folly gave Ms Duncan a letter setting out the company's requirements. There is a dispute between them about whether the meeting was on 10 or 11 October and whether the letter was given to Ms Duncan on 11 or 12 October 2007. Ms Duncan says they met on 10 October and she was given the letter late on the Friday afternoon (which she incorrectly refers to as 11 October). Mr Folly is adamant that the meeting was on Thursday 11 October and he gave Ms Duncan the letter later on the same day. Supporting Ms Duncan, there is evidence that she faxed the letter to an adviser at about 7.30pm on 12 October 2007 and she says that she sought advice the same day that she received the letter. There is an obvious logic in that. I note that

Mr Norris in his letter dated 17 October 2007 referred to Ms Duncan receiving the 11 October letter on the Friday afternoon at 5.30 pm. Supporting Mr Folly's evidence, the letter is dated 11 October 2007 suggesting it was drafted that day and one would expect it to be delivered promptly as well. However there is some confusion in HFP's letter dated 12 November 2007 about who met with Ms Duncan and when that occurred. On balance, I prefer the evidence of Ms Duncan as to timing.

[15] The letter itself summarises HFP's rationale for seeking Ms Duncan's agreement to a change in her role, talks up the opportunities for Ms Duncan in the proposed new role, reassures her about her being a valued employee and asks her to take the weekend to think things over. It ends with an invitation for her to meet again on Monday and have a representative with her if she wishes for the discussion.

[16] Ms Duncan's evidence is that she managed to contact and appoint a representative (Pat Norris) on Monday, 15 October 2007. The fax information mentioned above indicates there must have been some earlier contact with Mr Norris. Mr Norris rang and spoke to Mr Folly on the morning of Monday, 15 October 2007 who said he would have Mr Harvey call him back. Mr Harvey then phoned Mr Norris but refused to defer meeting with Ms Duncan to facilitate Mr Norris' attendance.

[17] There was a meeting on Monday, 15 October 2007 at about 3.30pm. There is some dispute about what happened. I am told by Mr Harvey and Mr Folly that no one made any notes during this meeting so I am left with the testimony of the two men and Ms Duncan and some material prepared by Mr Folly after the meeting. I accept that Mr Folly's note dated 17 October 2007 is substantially accurate as to what occurred. Ms Duncan was offered the position set out in the 11 October 2007 letter under the heading *Re: Change of role/Job Description at Harvey's Floorpride*. Ms Duncan said that she did not want that role and was told that there was no alternative but to make her current role redundant. She was told that this would come into effect immediately with four week's notice to be paid as normal salary payments with holiday pay paid at the end. Ms Duncan was offered the choice of leaving immediately or saying goodbye to other staff during the remainder of the afternoon. She chose to leave straight away. There was also some mention that Ms Duncan could come back and have another meeting with her representative present if she wished. Ms Duncan left the workplace as arranged.

[18] Mr Harvey's evidence is to the effect that HFP did not dismiss Ms Duncan but she left, effectively terminating her own employment. During the investigation meeting he did not resile from this perspective despite having his attention drawn to the note just mentioned and his own letter of 12 November 2007 which says *Leanne refused to accept any change to her duties to the point that that only alternative was to declare her position redundant*. I do not accept Mr Harvey's evidence that Ms Duncan terminated her own employment. HFP dismissed her on 15 October 2007.

[19] Ms Duncan returned to the workplace on 17 October 2007 to gather up her personal possessions. While there she was presented with and asked to sign Mr Folly's typed note dated 17 October 2007. It says *Please sign this letter to indicate that you accept this redundancy and terms*. Ms Duncan declined to sign this note. Mr Harvey indicated that her pay might be withheld until it was signed but Ms Duncan still refused and left.

### **Justification for the dismissal**

[20] Whether Ms Duncan's dismissal was justifiable must be determined on an objective basis by considering whether HFP's actions and how it acted at the time, were what a fair and reasonable employer would have done in all the circumstances. When an employer seeks to justify a dismissal by reason of redundancy it is necessary to consider whether there existed a genuine redundancy situation as well as whether the employer acted in a fair and reasonable manner applying the objective standard just mentioned. In addition, the employer must have complied with s.4(1A)(c) of the Employment Relations Act 2000 under which there is an obligation to provide access to relevant information and an opportunity to comment on that information before any decision is made.

[21] There is no mention of redundancy in the 13 April 2004 single page document that sets out some terms of the employment or in any other contractually binding document. For present purposes then I take the term to mean where an employee's employment is terminated by the employer, the termination being attributable to the fact that the position filled by the worker is or will become superfluous to the needs of the employer: see *GN Hale & Sons Ltd v Wellington etc Caretakers etc IUOW* [1990] 2 NZILR 1079. I am not satisfied that HFP has established that Ms Duncan's position was genuinely superfluous. Rather, what happened was that the remaining quoting

work not being done by sales staff was to be given to Rebecca while Ms Duncan was to take up the slack by undertaking the receptionist duties. I should note that HFP advertised in the local paper on 17 October 2007 for a *RECEPTIONIST* to perform *general reception duties*, essentially Rebecca's job. What is completely unexplained is why the introduction of the computer software created the need to move Rebecca from reception and general office duties she had been performing hitherto and to get Ms Duncan to take up that work. The job described in Ms Duncan's 13 April 2004 job description continued to exist but was to be performed by Rebecca rather than Ms Duncan. In other words, there was no superfluity.

[22] Even if there was a genuine redundancy situation, I am not satisfied that how HFP acted at the time was what a fair and reasonable employer would have done in the circumstances. In the end Ms Duncan was met with an ultimatum without a reasonable opportunity to get advice, be represented or comment on HFP's proposed *new role*. Mr Harvey specifically refused to defer the 15 October 2007 meeting. While it was suggested at that meeting that Ms Duncan could return later with her representative, by that time she had been dismissed.

[23] It follows that HFP unjustifiably dismissed Ms Duncan and she has a personal grievance.

### **Time and wage records**

[24] It took some time and persistence on the part of Mr Norris but HFP eventually provided him with time and wage records kept in accordance with the obligations specified in the Employment Relations Act 2000.

### **Post dismissal issues**

[25] Mr Harvey's substantive response to Ms Duncan's grievance is set out in his letter dated 12 November 2007. That letter includes the following:

*We are also disappointed that after Leanne left our company we discovered a considerable missue of our Internet and email including what appears to be downloading information from pornography sites.*

[26] There is some computer forensic evidence that the computer normally used by Ms Duncan was used to access some pornographic websites. Despite providing that evidence to the Authority, Mr Harvey told me that *this is not a major issue for me*.

Ms Duncan on the other hand is affronted by the claim that she was accessing pornography and the suggestion that it explained her reluctance to move to the reception position. There is no evidence to establish that Ms Duncan was the person responsible for this use of the computer. Typically her computer remained logged on and was available for others to use in her absence.

[27] Ms Duncan's evidence is that Mr Harvey told one of her prospective employers when approached that he *shouldn't touch her with a barge pole* and that she was *nothing but trouble and was bringing a personal grievance claim against HFP* and that she had misused the business computer for pornographic and gambling reasons. In his evidence Mr Harvey admitted telling the person that he *should not touch Ms Duncan with a barge pole* but says that he did not believe he mentioned the computer misuse. I do not accept Mr Harvey's albeit half-hearted denial.

[28] There is a complaint by Ms Duncan that Mr Harvey ignored her instructions to direct his communications through her representative after the dismissal. Mr Harvey's first breach of that instruction was because of an invoice owed by Ms Duncan to HFP. In his evidence Mr Harvey said that he approached Ms Duncan directly about this because it was not an employment issue. Later Mr Harvey made several phone calls to Ms Duncan's cell phone. Mr Harvey's explanation for these calls is that he thought he was selecting his wife's cell phone number from the numbers stored on his own cell phone. There is no reason to disbelieve Mr Harvey's explanation that these calls to Ms Duncan's cell phone were accidental. Mr Harvey's failure to follow the instruction on the first occasion is not material to the grievance.

### **Remedies**

[29] Having determined that Ms Duncan has a personal grievance I must consider the extent to which her actions contributed in a blameworthy manner towards the situation giving rise to the grievance.

[30] The only potentially blameworthy contribution was Ms Duncan's intemperate response about not doing the mail. That prompted Mr Harvey to get Mr Folly to meet with Ms Duncan and give her a letter during the week before the dismissal. However Mr Harvey intended to press ahead with his planned changes before this outburst so it made no material difference to what happened. Accordingly there is no basis for reducing remedies on account of Ms Duncan's contribution.

[31] There is a claim for \$5,000.00 compensation for distress. I accept Ms Duncan's evidence that her experience at HFP will affect her mental and emotional state in future employment relationships. Implicit is this is that her unfair treatment by HFP has affected her attitude to employers generally. Ms Duncan was also upset by being out of work from October 2007 until 3 March 2008 when she commenced part-time work that became full-time work after several weeks. Ms Duncan believes she missed out on other jobs she applied for before securing this new employment because of what was said by Mr Duncan to prospective employers such as that mentioned above. In these circumstances a claim of \$5,000.00 is modest and I award it in full.

[32] There is a claim for lost remuneration of \$8,034.00 covering the period of three months from the termination of the employment. I am satisfied that Ms Duncan suffered lost remuneration of at least that sum as a result of her grievance. Accordingly I order HFP to pay Ms Duncan \$8,034.00 (gross) compensation for lost remuneration.

### **Summary**

[33] Harveys Floor Pride Limited unjustifiably dismissed Ms Duncan.

[34] Harveys Floor Pride Limited is ordered to pay Ms Duncan \$5,000.00 compensation pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000.

[35] Harveys Floor Pride Limited is ordered to pay Ms Duncan \$8,034.00 (gross) compensation pursuant to s.123(1)(b) and s.128(2) of the Employment Relations Act 2000.

[36] Costs are reserved. Any claim for an award of costs must be made within 21 days by lodging a memorandum with the Authority and serving it on the other party who may then lodge and serve a reply within a further 14 days.

Philip Cheyne  
Member of the Employment Relations Authority