

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 6
5516975

BETWEEN TRACY ELMERS
 Applicant

AND BARTERCARD NEW
 ZEALAND LP
 Respondent

Member of Authority: Vicki Campbell

Representatives: Fraser Wood for Applicant
 Mark Donovan for Respondent

Investigation Meeting: 28 October 2014 in Rotorua

Submissions Received: 30 October and 21 November 2014

Determination: 8 January 2015

DETERMINATION OF THE AUTHORITY

- A. Ms Elers was unjustifiably dismissed by reason of redundancy.**
- B. Reinstatement is not practicable nor reasonable.**
- C. Bartercard New Zealand LP is ordered to pay to Ms Elers an amount equivalent to three months lost wages plus any bonus payments Ms Elers would have received had she continued to be employed during that three month period commencing on 20 September 2014. The payment is to be calculated and paid within 28 days of the date of this determination.**
- D. Bartercard New Zealand LP is ordered to pay to Ms Elers the sum of \$10,000 without deduction being compensation pursuant to section 123(1)(c)(1) of the Act within 28 days of the date of this determination.**
- E. Costs are reserved.**



Employment relationship problem

[1] Ms Tracy Elers was employed by Bartercard New Zealand Ltd from 7 May 2008 and then Bartercard New Zealand L P (“Bartercard”) until her position of Senior Trade Broker was disestablished on 13 August 2014 and her employment terminated by reason of redundancy on 19 August 2014.

[2] Ms Elers claims the termination of her employment was unjustified and seeks remedies including reinstatement. Bartercard denies the termination was unjustified and opposes the reinstatement of Ms Elers.

[3] Ms Elers also claimed arrears of wages in the form of unpaid bonuses and expenses. Bartercard agreed to pay the amounts requested and this claim was withdrawn at the investigation meeting.

[4] As permitted by s 174 of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Ms Elers and Bartercard but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Background

[5] Bartercard operates from 12 offices throughout New Zealand with its Head Office being located in Auckland.

[6] Ms Elers was initially employed as a Trade Broker in Rotorua. In October 2011 she was appointed to the role of Senior Trade Broker, the most senior position in the Rotorua office. During her employment Ms Elers reported to the Branch Manager for Tauranga and Rotorua who was based in Tauranga.

[7] Ms Elers says that in 2012 the number of Trade Brokers employed in the Rotorua reduced from three to two when an employee resigned. Ms Elers counts her role in the number of Trade Broking positions as Trade Broking was a significant aspect of her role. The position left vacant by the employee was never filled.

[8] I have compared the two job descriptions of the Trade Broker and the Senior Trade Broker and accept that on paper at least the two roles are substantially the same, albeit the senior role does have a component of managerial/supervisory function.



[9] The evidence shows that Ms Elers was concerned about the effect the ongoing vacancy was having on the ability of the branch to meet trading targets and requested a replacement on more than one occasion.

[10] In November 2013 a new employee was employed to work as a Trading Consultant in the Rotorua branch. The employee had been previously employed by Bartercard. Ms Elers was the supervisor in the branch. No discussion or consultation took place with Ms Elers before the new employee was appointed. The fact of the appointment was made known to Ms Elers after the appointment had been confirmed.

[11] Difficulties between Ms Elers and the Trading Consultant were immediately apparent. Ms Elers evidence is that she found the Sales Consultant difficult to supervise as she would not communicate and would not follow protocols in place in the branch such as indicating whereabouts by using an indicator board. Ms Elers also became aware that her salary was lower than the new Sales Consultant's salary and requested a review of her salary. Ms Elers raised her concerns with her immediate managers about the difficulties she was having and the salary differential with no success.

Restructuring process

[12] Ms Elers was due to meet with Mr Tony Dewsnap, National Manager Business Accounts on 7 August 2014 for a performance review meeting. Instead when Ms Elers and Mr Dewsnap met, Mr Dewsnap handed Ms Elers a letter setting out a proposal to restructure the Rotorua branch. In particular the proposal was to disestablish Ms Elers' role. The letter set out current vacancies for Ms Elers to consider should the proposal proceed. Ms Elers was invited to a formal meeting the following day at 10.00am to provide her feedback to the proposal.

[13] Mr Dewsnap recorded the meeting on 7 August 2014. A copy of that recording has now been provided to the Authority but was not provided to Ms Elers during the restructuring process. Mr Dewsnap advised Ms Elers that the restructuring was not about her personal performance but was about the role and the best use of company finances and resources. Ms Elers did not receive any information to support Bartercard's proposal to disestablish her role.

[14] Mr Dewsnap did not discuss the proposal to restructure the Rotorua branch with either of the other two employees.

[15] The parties met on 11 August 2014 for the purpose of allowing Ms Elers to provide feedback on the proposal. Ms Elers was represented during this meeting and requested more specific information regarding the proposal. The decision to proceed with the proposal and to disestablish Ms Elers role was made on 13 August 2014.

[16] The decision to terminate Ms Elers employment was made on 19 August 2014.

Issues

[17] The issues for determination are:

- a) Was the restructuring for genuine commercial requirements?
- b) Was the process used to implement the restructuring fair and reasonable and undertaken in good faith?
- c) If the dismissal by reason of redundancy is unjustified, what, if any remedies should be awarded?

Was the restructuring for genuine commercial requirements?

[18] The test of justification for dismissal is stated in section 103A of the Act. The test requires the Authority to assess whether Bartercard's actions and the way it acted was what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[19] The most recent authority on the application of section 103A in a redundancy setting is *Grace Team Accounting Limited v Brake*¹. That decision upheld the earlier Employment Court² decision where the Court confirmed that employers must show that a decision to make an employee redundant is genuine and based on business requirements. This requires the Authority to scrutinise the reasons relied on by the employer in making its decision to dismiss.

¹ [2014] NZCA 541.

² [2013] NZEmpC 81.



[20] Section 4 of the Act requires parties to an employment relationship to deal with each other in good faith. Parties are to be active and constructive in establishing and maintaining a productive employment relationship in which they are responsive and communicative. The statutory obligations of good faith require employers to provide affected employees with access to information relevant to the continuation of the employee's employment and an opportunity to comment on the information before the decision is made.

[21] Bartercard relied on the removal of the supervisory functions of Ms Elers role as part of its justification for disestablishing her role. The other key reason for the restructuring was to make savings.

[22] The evidence shows that Ms Elers role was substantially that of Trade Broker. Her supervisory functions were not a significant part of her role. The number of members each of the three trade brokers had responsibility for in the Rotorua office was similar and consistent with other trade brokers in other offices.

[23] Bartercard relied on a decline in trading figures for the 2012 and 2013 years. The number of trading brokers operating from the Rotorua office for the period under consideration was down by one. Ms Elers says this had an impact on the ability of the branch to exceed its targets. Mr Raymond Goubitz, Chief Financial Officer, gave evidence that he did not consider the office to be short staffed but also acknowledged that he was not aware that Ms Elers had been seeking confirmation that she would receive additional staff support.

[24] The section 4 good faith requirements extend an obligation on the employer to act in good faith about a proposal that might impact on the employer's employees³ and when making an employee redundant.⁴ There were three employees employed in the Rotorua office. Only Ms Elers was consulted about the restructuring even though both the Sales Consultant and the Trade Broker would be expected to increase the number of members in their portfolio. For the Trade Broker this would be a significant increase. The Trade Broker would be required to increase the number of

³ Employment Relations Act 2000 section 4(4)(d).

⁴ Ibid section 4(4)(e).



members in her portfolio from 69 to 100. At the very least the proposal to restructure the office would have a direct impact on the Trade Broker, Ms Grace Tuakana-Jones.

[25] Ms Tuakana-Jones gave evidence that when she found out about the increase in workload in late August 2014 she took a week's sick leave as she had become unwell. Ms Tuakana-Jones attributed her illness to the stress involved with the uncertainty of what was happening, the extra workload she was now expected to take on and her disappointment with the way Ms Elers had been treated.

[26] Information provided to the Authority to assist in its investigation process was not provided to Ms Elers during the restructuring process, despite requests to Bartercard to provide specific financial and other information. This was further demonstrated when Bartercard presented more and additional financial analysis in its submissions in an effort to answer questions asked of its witnesses at the investigation meeting. This information could and should have been available to Ms Elers during the restructuring process.

[27] Bartercard has failed to establish that the restructuring and redundancy of Ms Elers was based on genuine commercial reasons. It is too late after a decision has been made to attempt to justify it by providing all manner of financial and other analysis after the event. By the time the information was presented, Ms Elers was no longer an employee and was no longer in a position to respond to the information with a view to offering alternatives to Bartercard's proposal.

Was the process used to implement the restructuring fair and reasonable

[28] The process used by Bartercard had the hallmarks of a rushed process. Mr Dewsnap met with Ms Elers on Thursday, 7 August 2014 with a view to meeting again early the next morning (Friday) to seek her views on the restructuring proposal. At that stage Ms Elers had no information on which to base any feedback. Ms Elers sought legal advice and the meeting was postponed until Monday, 11 August 2014. At that meeting Ms Elers, through her legal representative sought further information but this was not forthcoming.

[29] The minutes from the meeting on 11 August 2014 show that at that meeting, rather than simply getting feedback on the proposal, Mr Dewsnap was seeking other

proposals or suggestions. Without the information supporting the reasons for the restructuring it was impossible for Ms Elers to provide any meaningful feedback or offer any alternative proposals.

[30] Ms Elers advised Bartercard during that meeting that she would happily consider being employed as a Trade Broker or a Trading Consultant as an alternative to redundancy.

[31] Two days later on Wednesday, 13 August 2014 Ms Elers was advised of the decision to disestablish her role. In that letter Ms Elers was advised of two possible redeployment options. Both were Client Development Trade Broker (Client Developer) positions, one based in Auckland and the other in Wellington. Ms Elers was also advised that she could apply for a role of Business Developer based in Christchurch.

[32] To accept any of these positions would require Ms Elers to move her husband and children from their current residence in Rotorua. Ms Elers was not provided with any information about the salaries or other requirements of the positions but was told to advise Bartercard the following day if she wished to take up any of the options.

[33] Ms Elers requested an extension of time for her to consider the redeployment options as 24 hours was not long enough. Ms Elers also had to request copies of the job descriptions, salary information and information about assistance with relocation.

[34] The job descriptions and other information was emailed that same day. An extension to 4.00pm on Monday, 18 August 2014 was granted to allow Ms Elers time to consider the redeployment options.

[35] The timeframe of five days (two of which were weekend days) was an extremely short period of time for Ms Elers to consider life changing decisions. Bartercard has provided no explanations as to why the consultation process needed to be carried out within such short timeframes.

[36] Bartercard had had the benefit of considering the situation it faced at the Rotorua branch for some time. As far as Ms Elers was concerned, the figures she had



received indicated the Rotorua branch was one of the highest performing offices and was consistently exceeding its key performance indicators as set by Bartercard. Ms Elers was faced with the loss of her position and income a decision which was proposed and implemented within the space of four working days. Ms Elers was faced with having to make a decision which would have a significant impact on her family with less than a week during which time she had to consider the full implications on her family and herself.

[37] After receiving the job descriptions Ms Elers, through her representative, advised Bartercard that she would like to be appointed to the position of Client Developer, Auckland with a proposal that the position be located in Rotorua. Ms Elers asked if the position was not able to be located permanently in Rotorua that Bartercard consider basing the position in Rotorua on a temporary basis until the end of 2014 as it would be difficult for her to relocate her family mid-way through the year.

[38] Bartercard responded on Tuesday, 19 August 2014 setting out a full explanation of the reasons why it preferred to have its Client Developers located in larger regions together and declined the option to have Ms Elers based in Rotorua even on a temporary basis.

[39] Ms Elers was not in a position to move at that time to Auckland or Wellington and her dismissal by reason of redundancy was confirmed on 19 August 2014.

Failure to consider alternatives

[40] The failure to consult with all the employees affected by the proposal to restructure the office means Bartercard did not fully consider all the alternatives to making Ms Elers redundant.

[41] In March 2014 Ms Tuakana-Jones requested a reduction to her working hours to allow her to undertake study at university. Ms Tuakana-Jones had commenced study in a Law degree through Waikato University and had to attend classes in Tauranga on Wednesday and Thursday nights. Mr Dewsnap discussed the proposal with Mr Goubitz and advised Ms Tuakana-Jones that they did not want her to work part time but would review the situation in the second semester. When Ms Tuakana-

Jones raised the question again at the commencement of the second semester (July 2014) the request was again declined.

[42] At the investigation meeting Mr Dewsnap acknowledged that Ms Tuakana-Jones' request to go part time was not factored into the decision to terminate Ms Elers' employment. This is surprising especially in light of Ms Tuakana-Jones evidence, which is accepted, that had she been consulted she would have seriously considered whether or not to volunteer for redundancy. Ms Tuakana-Jones had not been happy in her employment for some time. Ms Tuakana-Jones resigned on 1 October 2014 and has now left her employment with Bartercard.

[43] Bartercard submitted that the most effective means to reduce costs is to reduce the headcount. It seems to me that this could have been achieved by consulting with Ms Tuakana-Jones and may have avoided the need for Ms Elers to be dismissed at all. Bartercard's actions and the way it acted in this respect satisfies me that it has failed to genuinely consider alternatives to redundancy.

Determination

[44] Bartercard has failed to establish that the restructuring was a genuine business requirement. The failure to provide full information including the information provided after Ms Elers lodged her personal grievance was a breach of Bartercard's statutory duty of good faith. These actions were not the actions of an employer acting fairly and reasonably.

[45] The process used by Bartercard was rushed and unfair. While it cannot be said with any certainty that Ms Tuakana-Jones would have stepped aside in order for Ms Elers to remain in employment, it was a possibility that ought to have been explored.

[46] I find the dismissal of Ms Elers by reason of redundancy is unjustified. Dismissing Ms Elers by reason of redundancy is not what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[47] A fair and reasonable employer could have provided Ms Elers and her legal representative with the complete information and explanations it has since provided to



the Authority. This would have given Ms Elers a full opportunity to provide feedback on the proposal.

[48] Likewise a fair and reasonable employer could have provided more time for Ms Elers to consider the options of redeployment. While Bartercard says it was recruiting for the vacant positions at the time of the restructuring, the Auckland position was not filled until October.

[49] Further, an employer acting fairly and reasonably could and should have consulted with the two other employees working in the office. Both were to be impacted by the restructuring. The actual members within their portfolios would be changing as members who were not significant or top traders would be removed from their portfolio and other members added. Bartercard's failure to consult with all employees means it was not aware, until the Authority's investigation that Ms Tuakana-Jones had a strong desire to leave Bartercard with the possibility of a redeployment option for Ms Elers in Rotorua.

[50] Ms Elers is entitled to a consideration of remedies.

Remedies

[51] Ms Elers seeks reinstatement together with reimbursement of lost wages, compensation for hurt and humiliation and costs.

Reinstatement

[52] Ms Elers seeks reinstatement to the position of Trade Broker pending the development of a proper and fair process regarding the restructuring of the Rotorua office. Bartercard strongly opposes reinstatement. The Authority may provide for reinstatement if it is practicable and reasonable.⁵

[53] Practicability is the capability of reinstatement being carried out. The Authority should be satisfied the re-imposition of the employment relationship is feasible or can be carried out successfully.⁶ Reasonableness requires the Authority to enquire into the equities of the parties.⁷

⁵ Employment Relations Act 2000 section 125.

⁶ *Lewis v Howick College Board of Trustees* [2010] NZCA 320.

⁷ *Angus v Ports of Auckland Limited* [2011] NZEmpC 160; *H v A Ltd* [2014] NZEmpC 189.



[54] Ms Elers has asked the Authority to reinstate her to a different role than the role she left and is prepared to have Bartercard work through a new restructuring process which may have the same end result, that is, dismissal. The Authority will not order reinstatement if the likely result would be that the employer would again initiate restructuring leading to an employee's dismissal.⁸

[55] On 23 September 2014 the Board of Directors of Bartercard resolved to sell the Bartercard owned offices including the Rotorua office. A decision was made not to lease the office back as it is a converted domestic house and the preference was to have commercial office premises. Then, on 1 October 2014 Ms Tuakana-Jones resigned from her employment. Following a review of Bartercard's needs at that time, a decision was made not to replace Ms Tuakana-Jones but instead give responsibility for the top 70 members to the Trading Consultant and manage all other members through the Client Developers.

[56] In addition a telemarketer based in the Rotorua branch (but was independent of Ms Elers team) had indicated she wished to retire at the end of 2014. This leaves only the Trading Consultant in the Rotorua office and arrangements have been made for that person to work from home.

[57] Bartercard have closed other offices in similar circumstances including Invercargill. Also in Nelson, due to positions not being filled as people have left their employment with Bartercard, a remaining Trading Consultant now also works from home.

[58] The Authority is satisfied it is neither practicable nor reasonable to reinstate Ms Elers to the position from which she was made redundant nor a Trade Broker role.

Lost wages

[59] Ms Elers seeks reimbursement of lost wages from 20 September 2014 to the date of determination. An employee who has been dismissed must take steps to mitigate their losses. Ms Elers gave evidence at the investigation meeting that she had

⁸ *Baguley v Coutts Cars Ltd* [2000] 2 ERNZ 409 at [68] (a point not overturned by the Court of Appeal in *Coutts Cars Ltd v Baguley* [2001] ERNZ 660 (CA)).



applied for one job. Even though Ms Elers was seeking reinstatement, she had a duty to attempt to mitigate her losses. I am not satisfied that her efforts to mitigate warrant a departure from an award of three months lost wages.

[60] Pursuant to section 123(1)(b) of the Act Bartercard New Zealand LP is ordered to pay to Ms Elers an amount equivalent to three months lost wages plus any bonus payments Ms Elers would have received had she continued to be employed for the three month period commencing on 20 September 2014.

[61] I expect the parties can resolve the actual amount. If there are any issues leave is granted for either party to seek directions from the Authority. The payment is to be calculated and paid within 28 days of the date of this determination.

Compensation

[62] Ms Elers seeks compensation of \$10,000 for hurt and humiliation. In support of her claim Ms Elers has given compelling evidence to the Authority of the distress her dismissal has caused.

[63] Even though Bartercard provided some information to Ms Elers during the restructuring process, she was left with the sense that the decision to terminate her employment had been predetermined and personal. Ms Elers uncontested evidence is that the process of dismissal has knocked her confidence and has caused her difficulties with sleeping. In addition, the lack of paid employment has added a significant amount of stress and financial strain.

[64] I am satisfied Ms Elers suffered humiliation, loss of dignity and hurt feelings and that this was moderately severe. In all the circumstances I am of the view that an appropriate award for compensation is \$10,000.

[65] Bartercard New Zealand LP is ordered to pay to Ms Elers the sum of \$10,000 without deduction being compensation pursuant to section 123(1)(c)(1) of the Act within 28 days of the date of this determination.



Contribution

[66] Having determined that Ms Elers has a personal grievance I am required to assess the extent to which she contributed to the situation which gave rise to her grievance and reduce any remedies accordingly. Contribution denotes blameworthy conduct. In this case I find no such conduct established and therefore the remedies will not be reduced to reflect any contribution.

Costs

[67] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Ms Elers shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Bartercard shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.



Vicki Campbell
Member of the Employment Relations Authority

