IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 403/10
5296808

	BETWEEN	KATHY GARDNER Applicant
	AND	LINK BUSINESS BROKING LIMITED Respondent

Member of Authority:	Rachel Larmer
Representatives:	Clive Bennett, Counsel for Applicant Aaron Toresen, Advocate for Respondent
Investigation Meeting:	27 August 2010 at Auckland
Determination:	07 September 2010

DETERMINATION OF THE AUTHORITY

A Kathy Gardner has a personal grievance for unjustified dismissal.

B Link Business Broking Limited is ordered to pay Mrs Gardner $4,000 pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000.

C Link Business Broking Limited is ordered to pay Mrs Gardner $3,000 towards her legal costs.

Employment Relationship Problem

[1] Kathy Gardner has raised a personal grievance for unjustified dismissal as a result of her redundancy. She says that she was called to a meeting on 27 October 2010 and given one month's notice of redundancy. Mrs Gardner does not accept that there was a substantive justification for her redundancy; she says that Shannon Flemming was given her job and that another higher paid colleague's position should have been disestablished instead of hers.

[2] Link Business Broking Limited ("LBBL") seeks to justify Mrs Gardner's redundancy on the grounds it had serious financial difficulties and had to take immediate steps to cut costs. It says that Mrs Gardner's duties were disbursed among others, at no extra cost to the business, and that it decided to disestablish her position instead of her colleague's because her duties were easily able to be redistributed at no extra cost.

[3] Shannon Flemming is the Operations Manager for the LINK International Group Limited ("the franchisor"), the master franchisor of the Link Business Broking Limited group of franchisees. She works for the franchisor in the LINK Head Office and is not a LBBL employee. LBBL says it transferred the advertising functions of Mrs Gardner's role to its franchisor, to avoid incurring the costs associated with it. After Mrs Gardner was made redundant, Ms Flemming undertook these functions for her employer, the franchisor, as part of her Operations Manager role.

Issues

[4] The issues requiring determination are:

a. Did LBBL comply with its statutory good faith obligations?
b. Did LBBL have genuine reasons for making Mrs Gardner redundant?
c. Did LBBL follow a fair and proper process before making Mrs Gardner redundant?
d. Was Mrs Gardner's dismissal on the grounds of redundancy justified?
e. If so, what (if any) remedies should be awarded?

Did LBBL comply with its good faith obligations?

[5] Section 4(1A) of the Employment Relations Act 2000 ("the Act") requires an employer which is proposing to make a decision which may have an adverse impact on an employee's continued employment, to provide the employee with;

a. Access to information, relevant to the continuation of their employment (s4(1A)(c)(i)); and
b. An opportunity to comment on it before a final decision is made (s4(1A)(c)(ii)).

[6] Aaron Toresen admits that he did not provide Mrs Gardner with any information. He accepts that he had financial information available to him but says he did not share it because of confidentiality concerns. He did not suggest that sharing this information with Mrs Gardner would have unreasonably prejudiced LBBL's commercial position.

[7] I find that LBBL's failure to provide Mrs Gardner with any information relevant to its proposal to disestablish her position was a breach of its s4(1A) good faith obligations to her under the Act.

Did LBBL have genuine reasons for making Mrs Gardner redundant?

Commercial justification

[8] Mr Toresen produced unaudited financial accounts which showed that, as at the end of October 2009, LBBL had a significant six figure loss. He said he had not taken any drawings out of the company. His evidence was that LBBL's overdraft was at capacity and despite his requests, the bank had declined to extend it. He also said that as a result of his unsuccessful request to extend LBBL's overdraft, the bank then insisted that he sell his house in order to immediately reduce it. That occurred in November 2009, and he has not purchased another property.

[9] Mr Toresen says that Ms Gardner's redundancy was for purely commercial reasons. The main part of her job involved arranging advertising which the parties agreed consisted of about 60% of her role. As a result of Mrs Gardner's position being disestablished, the advertising function was transferred to the franchisor to do. Her other administrative functions were shared amongst existing staff. No new staff have been employed since Mrs Gardner was made redundant and Mr Toresen says that the business is still struggling.

[10] Mr Toresen explained that prior to making the decision to make Mrs Gardner redundant, the business had been experiencing significant and ongoing losses. He produced a graph which tracked these losses month by month. This clearly illustrated that in the three months before Mrs Gardner's redundancy LBBL lost a six figure

sum. Mr Toresen said that was not sustainable, and by disestablishing Mrs Gardner's position it saved $52,000 per annum.

Shannon Flemming

[11] Mrs Gardner accepted, in response to my question, that her belief that Ms Flemming had taken over her job was based on an assumption, rather than any direct evidence. Mrs Gardner said that because Ms Flemming took over her advertising duties, she believed that Ms Flemming was engaged to do her job.

[12] I heard from Ms Flemming, who told me that she is employed by the franchisor and works in the franchisor's Head Office. From May 2009 to the end of January 2010 Ms Flemming was based in the Gold Coast because the franchisor was opening a new franchise branch there. As Operations Manager for the franchisor, it was her job to assist the new Gold Coast franchisee to get its office up and running.

[13] Ms Flemming said that Mr Toresen asked her to take on the advertising functions of Ms Gardener's role from the end of November 2009, which she did. Ms Flemming says the advertising functions took her between 4-6 hours per week, so she just assimilated these extra tasks into the work she was already doing. She also remained based in the Gold Coast and did the advertising function from there until she returned back to New Zealand at the end of January 2010.

[14] I accept Ms Fleming's evidence that she was not employed by LBBL and did not take over Mrs Gardner's job. The evidence satisfied me that Ms Flemming has always continued with her full time role as Operations Manager for the franchisor, and merely undertook some of the advertising functions of Mrs Gardner's role, at no additional cost to LBBL.

[15] I also accept Mr Toresen's point that removing the advertising function from LBBL meant that it still got the benefit of having these tasks done without having to pay anything for it, because the franchisor performed this function as part of the assistance it provided to franchisees. Even if Mrs Gardner had managed to convince me that Ms Flemming had taken over her job, that would still not assist her claim, because LBBL did not have to pay Ms Flemming's salary.

[16] It is clear to me that LBBL had genuine commercial reasons for making Mrs Gardner redundant. It saved her salary of $52,000 whilst continuing to get the work she was doing done, at no extra cost to the business.

Selection of position to be disestablished

[17] There were three members of the administration team. Mrs Gardner was the Administration Team Leader; there was a typist who typed up the contracts for all of the brokers, and there was a receptionist.

[18] Mrs Gardner says that the typist was paid $5,000 more than her, so that person should have been made redundant before she was. Mrs Gardner also says the typist should have been made redundant because the typist's role could have been shared amongst Mrs Gardner and the receptionist, who could both type.

[19] I accept Mr Toresen's evidence that it would have been impractical to have disestablished the typist's role and reallocated her duties to the receptionist and Mrs Gardner. However, even if I was not minded to have accepted his explanation for deciding to disestablish Mrs Gardner's position instead of one of the other two administration roles, given I have found that there were genuine commercial reasons for immediately reducing outgoings, the decision about which position to disestablish was within LBBL's exclusive management prerogative.

[20] It is not for the Authority to second guess the employer's decision by substituting its own view of which position should have been disestablished. The Chief Judge in *Simpson Farms v Aberhart* [2006] 1 ERNZ 825 made that clear when he stated:

> *"So long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant is for the employer to make and not for the Authority or Court, even under s103A"*

[21] I find that LBBL had good commercial reasons for disestablishing Mrs Gardner's position and that Mr Toresen was not improperly motivated when making Mrs Gardner redundant.

Did LBBL follow a fair and proper process before making Mrs Gardner redundant?

[22] It was common ground that Mr Toresen had two meetings with Mrs Gardner. The first occurred at around 3.30 pm on Friday 23 October 2009, and the second was held at 9.30am on Tuesday 27 October 2009 (the day after Labour Day). Both meetings lasted about ten minutes.

[23] Mrs Gardner received no advance warning of either meeting, was not told what the meetings were about, and was not offered the right to be accompanied by a support person or representative. No documentation was provided either in advance of, or at, each meeting.

23 October 2009 Meeting

[24] At the 23 October 2009 meeting, Mr Toresen says: *"It was made very clear to Kathy that her position was potentially at risk of redundancy."* He said he told her that the business was facing financial difficulties, redundancies were likely, and that the directors were looking at all positions. His evidence was that he told Mrs Gardner that she might be made redundant, that she should seek advice, and use the weekend to come up with ideas/alternatives for cost reduction for them to discuss the following week.

[25] Mrs Gardner says she was told there might be redundancies, but not that her position was at risk. She said she assumed her position was safe because she did not think anyone else could do her job. Mrs Gardner says she was worried all weekend about how the administrative team would cope if someone was made redundant, because she believed they were all working at capacity. Her husband Rod Gardner's evidence was that over the weekend his wife was worried about having to tell her team about possible staff cuts.

[26] Mr Toresen did say that there were likely to be redundancies, but I find that he did not clearly communicate to Mrs Gardner that her position was at risk. Although that may have been his intention, I prefer Mrs Gardner's evidence that did not actually

occur. I consider that if Mrs Gardner had been aware that her position was at risk, she would have discussed that with her husband over the weekend. Instead her worry was about the other administrative team members, which indicates that she did not know her position was at risk.

[27] The very limited information Mr Toresen communicated to Mrs Gardner was insufficient to enable her to understand that her position was at risk; why it was at risk; what savings LBBL hoped to achieve; what LBBL was proposing to do with her duties; and what the likely effect would be on her if the proposal was adopted.

[28] If the aim of the 23 October 2009 meeting was to table a restructuring proposal, then LBBL failed to properly achieve that. I find that there was insufficient information to enable Mrs Gardner to properly understand what was proposed and why. This meant that she was unable to meaningfully engage in consultation with LBBL before it made it final decision to disestablish her position.

27 October 2009 meeting

[29] In terms of the meeting on 27 October 2009, Mr Toresen said he asked Mrs Gardner if she had any thoughts on what they had discussed, and when she did not, he told her that she was being made redundant. She was given one month's notice of redundancy, which she was required to work out. Mr Toresen offered her a reference and time off during her notice period to look for other jobs. He also apologised for making her redundant and emphasised that it was not personal, but was solely due to the serious financial difficulties LBBL was facing.

[30] Mrs Gardner said she was not asked for her thoughts on how to reduce costs, but was told straight out that she was being made redundant. She described this as a bombshell and says she was shocked and stunned because she had not been prepared for it at all.

[31] If Mr Toresen intended this meeting to be the consultation meeting, during which Mrs Gardner was given an opportunity to comment on the proposal, then this did not constitute a fair process. Given my finding that Mrs Gardner was not aware of

what was proposed, it was unreasonable to expect her to provide feedback during this meeting.

Process used was unfair

[32] I find that the process used by LBBL was seriously defective. It did not put a proper proposal to Mrs Gardner, which precluded her from engaging in meaningful consultation. As a result, Mrs Gardner was not given a fair or reasonable opportunity to provide feedback on the proposed disestablishment of her position or advised of her right to representation.

[33] Even if a proper proposal had been provided to Mrs Gardner, then the timeframe for requiring her feedback on it was too tight, and therefore unfair. The possibility of redundancies was first raised at 3.30pm on Friday 23 October 2009, so it was unreasonable for LBBL to expect her to provide it with feedback by 9.30am on Tuesday 27 October 2009, because the previous day was a public holiday. If she had wanted to take advice, this tight timeframe would not have enabled her to do so.

[34] I find that LBBL breached its s4(1A) of the Act good faith obligations because Mrs Gardner was not given access to information relevant to her proposed redundancy or an opportunity to comment on that before a final decision was made to make her redundant. This failure contributed towards the unfairness of the process which was used. LBBL did not carry out a fair and proper process before making Mrs Gardner redundant.

Was Mrs Gardner's dismissal on the grounds of redundancy justified?

[35] Because of the serious financial difficulties facing LBBL, and the limited options it had available to address that, this is a case in which I find that a fair process would have been unlikely to have made any real difference to the outcome.

[36] I therefore find that Mrs Gardner's dismissal was substantively justified but carried out in a procedurally unfair manner. Applying the s103A justification test, I find that LBBL's actions and how it acted were not what a fair and reasonable

employer would have done in all of the circumstances. Her dismissal was therefore unjustified.

What (if any) remedies should be awarded?

[37] Because I have found that a fair and proper process would still have been likely to have resulted in Mrs Gardner having been made redundant, no award of lost remuneration pursuant to s128 of the Act is appropriate.

[38] Mrs Gardner has claimed $10,000 pursuant to s123(1)(c)(i). I accept that she did suffer humiliation, loss of dignity, and injury to feelings and is entitled to compensation for that. When fixing the amount I have had regard to the fact that Mr Toresen told Mrs Gardner that the decision was not about her personally, and offered her a positive reference, paid time off work during the notice period to look for alternative work (which she took full advantage of), and a staff leaving function.

[39] Bearing these factors in mind, together with the evidence Mrs Gardner gave of being devastated by her redundancy and of losing her confidence, her husband's evidence about the effects of her dismissal on her, her length of service of four years, and awards in other cases, I consider that $4,000 is appropriate.

[40] LBBL is ordered to pay Mrs Gardner $4,000 pursuant to section 123(1)(c)(i).

Costs

[41] The parties confirmed that there were no "without prejudice except as to costs" offers made in respect of this matter, so Mr Bennett made costs submissions during the investigation meeting.

[42] Mrs Gardner has been successful, so is entitled to a contribution towards her actual legal costs. Mr Bennett said that her actual legal costs to date are $6,000. I consider the usual tariff approach involving a daily rate of around $3,000 is appropriate.

[43] LBBL is ordered to pay Mrs Gardner $3,000 towards her legal costs.

Rachel Larmer
Member of the Employment Relations Authority