

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA159/08
5094404

BETWEEN HELENE JOYCE GIBBONS
Applicant

AND KOVES PLASTIC
INDUSTRIES LIMITED
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Mark Nutsford, advocate for Applicant
Lorne Campbell, counsel for Respondent

Investigation Meeting: 21 April 2008

Determination: 29 April 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The problem as expressed by Ms Helene Gibbons in her personal grievance claim lodged in the Authority is that she was “*unjustifiably dismissed by way of procedural unfairness and possible false redundancy.*”

[2] To resolve her grievance she has sought orders from the Authority against her employer, Koves Plastics Industries Limited (“KPI”), for the reimbursement of lost wages, compensation for distress and for the reimbursement of her legal costs.

[3] When Ms Gibbons raised the grievance about her dismissal she also questioned a deduction of \$865.35 made by KPI from her final pay.

[4] The Authority has investigated the dismissal and the pay deduction, after mediation between the parties did not resolve those problems.

[5] In summary and for the reasons that follow, the determination of the Authority is that:

- (i) Ms Gibbons was dismissed because of redundancy. Her position of employment for commercial reasons was determined by KPI to be surplus to the requirements of the employer. There was no lack of justification for the dismissal in that regard;
- (ii) In deciding to dismiss Ms Gibbons for redundancy, KPI failed to observe the statutory obligation to deal with her in good faith. In particular KPI failed to provide her with access to relevant information about the decision to dismiss her and failed to give her an opportunity to comment on that information before making the decision. In that regard Ms Gibbon's dismissal was unjustified.
- (iii) Ms Gibbons has no entitlement to recover the \$865.35 shown as deducted from her final pay. This amount was for four and a half days leave taken by her on pay within the first six months of employment when she was not entitled to paid leave. The individual employment agreement applicable to Ms Gibbons expressly permitted KPI to make a deduction from her final pay for debt owing to the company, including for any annual leave granted before she had become entitled to it.

[6] The justification in all respects, substantive and procedural, for the dismissal of Ms Gibbons is to be determined by the Authority under s 103A of the Employment Relations Act 2000. The Authority must consider, on an objective basis, whether the decisions made by the employer, and the employer's manner of making those decisions, were what a fair and reasonable employer would have done in all the circumstances at the relevant time.

[7] A fair and reasonable employer must also comply with the statutory obligations of good faith dealing in s 4 of the Act, including the obligation to consult and provide relevant information.

[8] Ms Gibbons met with the new General Manager of KPI, Mr Gordon Haynes, on 4 July 2006 to discuss proposals to reorganise the employer's operations. Specifically they discussed disestablishing her position in the finance/accounts-

administration area of operations. The following day Ms Gibbons was notified by Mr Haynes that a decision had been made to disestablish her position and that accordingly four weeks notice of termination of employment was given to her. As Ms Gibbons was then still recovering from an injury suffered at work and was not expected to be fit to return for another four or five weeks, Mr Haynes advised that she would be paid her entitlement to four weeks wages in lieu of working out the notice period.

[9] As held by the Employment Court in *Simpson Farms Limited v. Aberhart* [2006] ERNZ 825, under s 103A of the Act it remains the law that so long as an employer acts genuinely and not with ulterior motive, a business decision to make any position of employment redundant is for the employer to make and not for the Authority.

[10] Accordingly, the law continues to be that stated by the Court of Appeal in 1990 when deciding *G N Hale & Son Limited v. Wellington Caretakers etc IUOW* [1992] NZILR 1079; an employer is entitled to make his business more efficient by reorganisation or other cost saving steps and the worker does not have the right to continued employment if the business can be run more efficiently without him or her. The Court of Appeal stated in the *Hale* decision:

If for genuine commercial reasons the employer concludes that a worker is surplus to its needs, it is not for the courts or the unions or workers to substitute their business judgment for the employer's.

[11] From all of the evidence supplied to or obtained by the Authority, including the oral evidence given by Mr Haynes, I am fully satisfied that the decision to disestablish Ms Gibbons' position was reached on the basis of commercial demands on KPI's business rather than any factors personal to her. Tightening market conditions had led to a measurable deterioration in the financial performance of KPI. The company was assessed by management as being overstaffed in the administration area as well as others such as production, and there were several more dismissals for redundancy in different areas after Ms Gibbon's departure.

[12] The adverse "*economic circumstances*" of the company placed it in a situation falling within provisions of the employment agreement addressing termination for redundancy. I therefore find that KPI had proper and sufficient grounds in law to

justifiably dismiss Ms Gibbons and did so for reasons that were nothing to do with her conduct or performance in any way.

[13] However, in the circumstances it was understandable and foreseeable that Ms Gibbons would become suspicious of the motivation for her dismissal once she found out how her former job was being carried out after her departure. She learned that KPI had engaged Ms Robin Greer to perform similar work for the company.

[14] The evidence establishes that Ms Greer signed a Contract for the Provision of Services with KPI on 10 July 2006, just a few days after the termination of Ms Gibbon's employment. Ms Greer was known to Ms Gibbons as the employee she had replaced as the Accounts/Administration Person when commencing with KPI in November 2005.

[15] When Ms Greer's re-engagement was raised by Ms Gibbon's representative he received the response from Mr Haynes that Ms Greer had not returned to KPI as an employee but was an independent contractor performing services when required. It is clear that Ms Greer performed much if not most of the work that Ms Gibbons had been doing, although she had less work and was under quite different remuneration arrangements reflecting her contractor status.

[16] I find that the availability of Ms Greer to perform this work on that basis was known to Mr Haynes prior to his discussing with Ms Gibbons the possibility or prospect of her redundancy at the meeting on 4 July.

[17] Notes requested by the Authority show that Ms Greer and her availability to perform the work were discussed by Mr Haynes in a meeting with KPI's Managing Director, Mr Andrew Koves, held on 28 June 2006. The notes record the following was discussed by Mr Koves and Mr Haynes:

*Restructure Overstaffed Areas
Accounts/Admin.*

- *Options; R.PL. Accountants – outsource accounts*
- *R. Greer – contract office admin/accounts role*
- *Benefit; fixed weekly cost, part time role working to other contracting roles, reduced wages/costs, external resource, prior company knowledge.*

[18] Mr Haynes confirmed in his evidence that Ms Greer, having previously been an employee until she left in November 2005 and was replaced by Ms Gibbons, had

approached the company in around June 2006 to offer her services on a contracting basis. At that stage he said the company was given a charge out rate for her services if engaged.

[19] I find in relation to the knowledge KPI had of Ms Greer's availability as a contractor and the level of fees she would charge for the work then being performed by Ms Greer, KPI did not disclose this as information relevant to its decision to terminate the employment of Ms Gibbons when it met with her to discuss restructuring. I find that although there was consultation by KPI it was not full or extensive enough to meet the requirements of s 4 of the Act.

[20] KPI failed to disclose that it was considering a proposal to employ or engage Ms Greer to carry out the work being performed by Ms Gibbons on a contract for services basis which most likely would require Ms Greer for three days a week. I find it likely that even before Mr Haynes had met with Ms Gibbons to discuss possible redundancy, KPI was inclined towards engaging Ms Greer to perform this work on contract as an alternative to maintaining a position of employment for it.

[21] To consult properly KPI should have put to Ms Gibbons for comment the availability of Ms Greer replace her. Under s 4(1A) of the Act the employer should have told Ms Gibbons about this possibility or proposal, as it was relevant to the continuation of Ms Gibbons' employment and was information that had a bearing on the decision to terminate the employment of Ms Gibbons. Under s 4(1A) she should have been provided with an opportunity to comment on that information before the decision to dismiss was made.

[22] On this basis I consider that the dismissal of Ms Gibbons was unjustified. Objectively, the way in which KPI made the decision to dismiss was not what a fair and reasonable employer would have done in all the circumstances at the relevant time. A fair and reasonable employer will of course comply with the statutory obligations of good faith dealing in s 4, including the provisions relating to the supply of information under s 4(1A) of the Act. KPI did not do that.

[23] A decision to dismiss made in breach of s 4 of the Act does not necessarily mean that redundancy as the ground relied upon was not genuine. It may amount to evidence that redundancy was merely a pretext and that dismissal was for a different reason, but in this case I am satisfied from other evidence that this was a genuine

redundancy situation and that redundancy was the principal, if not the sole, motivating factor in KPI's decision.

[24] A failure to consult Ms Gibbons at all would not necessarily have rendered the decision to dismiss on the grounds of redundancy unjustified. It follows that a failure to consult fully or adequately enough cannot negate the genuineness of the redundancy in this case. As stated by the Court of Appeal in *New Zealand Fasteners Stainless Limited v. Thwaites* [2000] 1 ERNZ 739, at paragraph [23], the genuineness of the redundancy of one position once established cannot be negated by a failure to offer a different position.

[25] The remedies to which Ms Gibbons should be entitled must be fixed according to the harm and loss suffered as a result of the grievance, being the failure to consult in good faith. The grievance is confined to that lack of fair and reasonable treatment. Mr Haynes did I find mention in broad terms the possibility of engaging contractors in his discussion with Ms Gibbons on 4 July. As well as discussing with her a possible option of working reduced hours as an employee, or performing different work for the company, he did raise the possibility that KPI would “*outsource*” work. He did not however go so far as to say that KPI had already had discussions with Ms Greer about her performing that work for several days a week at a particular level of fee. He did not tell her that KPI had developed a strong interest in engaging Ms Greer.

[26] The response of Ms Gibbons to the discussions on 4 July was immediately given to Mr Haynes by email early the following day, in which she said the following:

I wish to inform you that under the circumstances I would prefer to take redundancy rather than accept a reduced role within the company.

[27] It seems to me likely that if Ms Gibbons had been asked to consider the possibility of working as a contractor for three days a week at a rate similar to that offered by Ms Greer, she would have declined as she was concerned to maintain her position without loss of hours and consequently pay. There can therefore be no loss of wages flowing from the failure to consult with Ms Gibbons fully or adequately in relation to the provision of relevant information.

[28] I find that Ms Gibbons predictably did suffer some distress to find out after her dismissal that Ms Greer, a former employee, had been re-engaged by the company.

Since KPI had not told her anything about this possibility she was left to assume, not unnaturally, that Ms Greer had simply replaced her in the position, and she was left to conclude that the dismissal was for personal reasons relating to her conduct or performance.

[29] Compensation must therefore be assessed on the basis of the distress caused by the failure to provide relevant information, but not by the loss of the position itself which was a consequence of a genuine redundancy situation.

[30] I consider that for several reasons there was also a lack of sensitivity in the way Ms Gibbons was consulted about redundancy. This aggravated the unfair consultation process. The meeting on 4 July was the first time Ms Gibbons had met Mr Haynes who had only been with KPI a fortnight or so. Coupled with that circumstance, when the meeting took place at Mr Hayne's request Ms Gibbons was still on leave recovering from and being treated for an injury suffered at work some weeks earlier. Also, as recorded in Mr Hayne's meeting notes, he asked Ms Gibbons to consider redeployment options including work as a machine operator and process worker in packing or assembly. It seems to me that Mr Haynes did not find out as much as he could have about Ms Gibbons to know that these were not practicable options for the person she was and with her employment background. The offer of them simply increased her feeling of hurt by the treatment received.

[31] I assess compensation at \$2,250, which is to be paid by KPI to Ms Gibbons under s 123(1)(c)(i) of the Act.

[32] As to the deduction from Ms Gibbon's final pay, she had taken leave twice and had been paid for that. On both occasions she had not been employed for longer than six months and was therefore not entitled under the Holidays Act 2003 to paid sick leave or to take paid leave for any other special purpose under the statutory provisions.

[33] In March 2006 she applied for three days leave without pay to attend her mother's funeral. Then in April 2006 she applied for two and a half days sick leave "*without pay*" because her father was ill. I find from her evidence that she was granted the time off work but the question of whether that would be paid, although taken up by her with management, had not been answered by the time she took the leave or when she was dismissed.

[34] The Sick Leave/Bereavement Leave provisions of Ms Gibbon's employment agreement are expressed to be inclusive of and not in addition to the relevant statutory provisions. The statutory minima were therefore also her maximum entitlement and they required service for six months before there was eligibility for paid sick leave or bereavement leave. The position must be that she had no approval to take paid leave and therefore the company was justified in deducting the amount outstanding from her final pay. The deduction itself was permitted by the employment agreement. I note that four and a half days was deducted rather than the five and a half taken.

[35] I fix costs to be paid by KPL to Ms Gibbons as \$1,250.

A Dumbleton
Member of the Employment Relations Authority