

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 268
5400477

BETWEEN

LYNDA GRIFFITH
Applicant

A N D

TRUTH WEEKENDER
LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: May Moncur, Counsel for Applicant
No appearance for Respondent

Investigation Meeting: 24 June 2013 at Auckland

Date of Determination: 25 June 2013

DETERMINATION OF THE AUTHORITY

A. Truth Weekender Limited (Truth) unjustifiably dismissed Mrs Griffith. It is ordered to pay her within 28 days :

- (a) \$9,120 lost remuneration;**
- (b) \$6,500 distress compensation;**
- (c) \$500 costs;**
- (d) \$71.56 to reimburse the filing fee.**

Employment relationship problem

[1] Mrs Lynda Griffith was employed by Truth weekender Limited (Truth) as an Account Manager/Advertising Salesperson in December 2011. She was given two weeks' notice of redundancy on 3 September 2012. Mrs Griffith was badly affected by the shock of being made redundant without any prior consultation so saw her doctor immediately and remained on sick leave for her notice period.

[2] Mrs Griffith claims her redundancy was substantively and procedurally unjustified. She says she was never given any information about Truth's financial situation or why her position had been selected for disestablishment. She says she was just notified without any prior consultation.

[3] Mrs Griffith says she was called to a meeting by the then director Mr David Crowe on 3 September 2012 during which he abruptly told her she had been made redundant.

No appearance by Truth

[4] The Authority was advised Truth ceased to trade during the week commencing 17 June 2013. A director, Mr Dermott Malley, emailed the Authority on the evening of Friday 21 June 2013 to advise that the company was in discussions with liquidators and so would not be attending the Authority's investigation. Mr Malley's email included information about the drop in sales which had occurred in the months preceding Mrs Griffith's redundancy.

[5] Mr Malley's email says Mr David Crowe was the sole director and in charge of the business at all material times in respect of Mrs Griffith's employment issues but that he had "*made himself unavailable*" so Truth was unable to produce a witness statement relating to Mrs Griffith's redundancy.

Issues

[6] The Authority must determine:

- (a) Whether Mrs Griffith's dismissal was justified;
- (b) If not, what if any remedies should be awarded;
- (c) Costs.

Was Mrs Griffith's dismissal justified?

[7] Justification is to be determined in accordance with the justification test in s.103A of the Employment Relations Act 2000 (the Act). This requires the Authority to objectively determine whether "*the employer's actions, and how the employer*

*acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.”*¹

[8] When assessing justification the Authority must consider whether the employer has complied with the four procedural fairness tests set out in s.103A(3) of the Act. It may also consider other factors it thinks appropriate.²

[9] A fair and reasonable employer is expected to comply with its statutory obligations. In this case, Truth was required by s.4(1A) of the Act to provide Mrs Griffith with information relevant to her proposed redundancy and an opportunity to comment on that before she was made redundant. That did not occur so I find Truth breached its good faith obligations to Mrs Griffith.

[10] I also find Truth did not comply with any of the four tests in s.103A(3) of the Act which relate to natural justice and procedural fairness. These failures fundamentally undermine Truth's ability to justify Mrs Griffith's redundancy.

[11] The failure by Truth to follow a fair or proper process before making Mrs Griffith redundant resulted in significant unfairness to her, so s.103A(5) of the Act does not preclude a finding of unjustified dismissal.

[12] Mrs Griffith was called to a meeting with Mr Crow without any advance notice. She was not told that the outcome of the meeting could be dismissal on the grounds of redundancy. She was given no information about the decision to disestablish her position. She had no opportunity to take advice or arrange for a representative or support person to accompany her.

[13] Mrs Griffith was not told why she had been selected for redundancy over the two other people who did the same or similar job to her. Nor was she told how her work was going to be covered in her absence. She had no opportunity to identify any alternatives to her redundancy. I accept Mrs Griffith's evidence that she was simply told by Mr Crowe in a five minute conversation that she had been made redundant.

[14] In terms of substantive justification Truth bears the onus of establishing on the balance of probabilities that it had a good reason for making Mrs Griffith redundant. I find it has been unable to discharge that onus.

¹ Section 103A(2) of the Act

² Section 103A(4) of the Act

[15] There was no evidence about why Mrs Griffith's position had been disestablished instead of other positions. Nor was there evidence to explain why she had been selected for redundancy over two of her colleagues who did the same or similar job as her. Mrs Griffith also gave hearsay evidence (related to her by a former Truth employee) that Truth had engaged another person to do her job and/or parts of it after she had been made redundant.

[16] I find that Mrs Griffith's dismissal was substantively and procedurally unjustified.

What remedies should be awarded?

Mitigation

[17] It is clear from the evidence produced that Mrs Griffith has made substantial efforts to mitigate her loss by seeking new employment.

Lost remuneration

[18] Despite on-going efforts Mrs Griffith has not found new employment since being made redundant. Her only income since her redundancy has been from a Work and Income New Zealand benefit.

[19] I am not satisfied on the balance of probabilities that a fair and proper process would have inevitably resulted in Mrs Griffith being made redundant in September last year, so she is not precluded from recovering lost remuneration.

[20] Truth is ordered to pay Mrs Griffith \$9,120³ lost remuneration under s.128(2) of the Act.

Distress compensation

[21] The evidence in support of Mrs Griffith claim for distress compensation was compelling. She has required medical attention and suffers on-going depression. She explained her deep shock and distress about being made redundant without any prior warning her job was at risk.

³ \$19 per hr x 40 hr pw = \$760 pw x 12 wks.

[22] Mrs Griffith had just returned from holiday four days earlier and had no inkling Truth was facing financial difficulties. She was also very upset that she was the only person targeted for redundancy.

[23] Mrs Griffith's dismissal has left her vulnerable, angry, upset, tearful, stressed, depressed, humiliated and physically sick. It has adversely affected her physically, socially and emotionally. She has found it hard to cope financially and with normal day-to-day life.

[24] Mrs Griffith was obviously very distressed and became tearful many times during the Authority's investigation meeting. She described her unjustified dismissal as having "*a horrible effect*" on her. That evidence was supported by her friend and neighbour.

[25] Truth is ordered to pay Mrs Griffith \$6,500 under s.123(1)(c)(i) of the Act to compensate her for the humiliation, loss of dignity and injury to feelings she has suffered as a result of her unjustified dismissal.

Costs

[26] Mrs Griffith as the successful party is entitled to an award of costs. I am satisfied from a copy of the invoice rendered by her representative that Mrs Griffith has incurred costs.

[27] The Authority's current notional daily tariff is \$3,500. Ms Moncur was unable to identify any factors which would warrant an adjustment to the notional daily tariff, so the notional daily tariff is adopted on a pro-rata basis to reflect the length of the Authority's investigation meeting.

[28] Truth is ordered to pay Mrs Griffith \$500 towards her actual costs together with \$71.56 to reimburse her filing fee.

Orders

[29] Truth is ordered to pay Mrs Griffith within 28 days:

- (a) \$9,120 lost remuneration;
- (b) \$6,500 distress compensation;

- (c) \$500 costs;
- (d) \$71.56 to reimburse her filing fee.

Rachel Larmer
Member of the Employment Relations Authority