IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 95/08
5085465

	BETWEEN	VERRYN HEAP Applicant
	AND	CALIBRE PLASTICS LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Barbara Buckett, Counsel for Applicant David Flaws, Advocate for Respondent
Investigation Meeting:	2 October 2007, 3 & 4 March 2008 at Wellington
Determination:	14 July 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant says her dismissal for redundancy from her job with the Respondent as a specialist seller of endoscopy equipment was neither for genuine reasons nor fairly carried out. She seeks remedies of lost wages, compensation for hurt and humiliation and her costs.

[2] The Respondent says the Applicant was employed at her own suggestion to sell a particular brand of specialised medical equipment for which the Respondent had become the New Zealand distributor. Targets for sales were not met. Although the Applicant also worked on sales of another brand of related specialist equipment, the costs of the sales operation, including her position and salary, could not be sustained.

[3] The Respondent says it acted fairly throughout, including by consulting the Applicant after its decision not to renew its distribution agency agreement and

considering her suggestions about alternative arrangements before advising her of the redundancy of her position.

The investigation

[4] Relevant information provided for the investigation included written witness statements from the Applicant, her psychologist Dr Mary Miller, the Respondent's managing director Malcolm Hubbert and the Respondent's sales manager Heather Laanbroek. The parties provided documents about the Applicant's employment, the Respondent's business plans and various reports, and correspondence between them and their representatives.

[5] Through the investigation the Applicant, Mr Hubbert and Ms Laanbroek provided further sworn or affirmed oral evidence in answer to questions from the Authority and the representatives. The representatives provided oral closing arguments.

The law

[6] The Authority does not substitute its judgment for that of an employer as to whether there are genuine commercial reasons for a redundancy. As stated by the Court of Appeal in *GNH Hale & Sons Ltd v Wellington Caretakers and Cleaners Union* [1990] 2 NZILR 1079, 1084; ERNZ Sel Cas 843, 849 (per Cooke P):

> *An employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, reorganisation or other cost saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have the right to continued employment if the business can be run more efficiently without him. The personal grievance provisions … should not be treated as derogating from the rights of employers to make management decisions genuinely on such grounds.*
> …
> *When a dismissal is based on redundancy, it is the good faith of that basis and the fairness of the procedure followed that may fall to be examined on a complaint of unjustifiable dismissal. Subject to the terms of any relevant redundancy agreement … or agreed provision, the Court … cannot properly be concerned with an examination of the employer's accounts except insofar as it bears on the true reason for dismissal. For instance, a suggestion that alleged redundancy was being used as a camouflage for getting rid of an unsatisfactory employee might warrant examination.*

[7] The Respondent's decision to make the Applicant's position redundant – and how it went about dealing with her about any proposal, decision and consequences of redundancy – is justifiable if its actions were what a fair and reasonable employer would have done in all the circumstances at the time of the decision and dealings around it: s103A of the Employment Relations Act 2000 ("the Act").

[8] The application of s103A to personal grievances involving redundancy was described in this way in *Simpsons Farms Limited v Aberhart* (unreported, EC Auckland, ARC 13/06, 14 September 2006):

> *[65] … The statutory obligations of good faith dealing and, in particular, those under s4(1A)(c) inform the decision under s103A about how the employer acted. A fair and reasonable employer must, if challenged, be able to establish that he or she or it has complied with the statutory obligations of good faith dealing in s4 including as to consultation because a fair and reasonable employer will comply with the law.*
>
> …
>
> *[67] … 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 the Court, even under s103A.*

[9] So the Authority must be satisfied on two general points – whether the business decision to make a position redundant in this case was made genuinely and not for ulterior motives; and whether the respondent act in a fair and open way in carrying out that decision – particularly did it consult properly about the proposal to make her position redundant and otherwise act in a way that was not likely to mislead or deceive her, that is in good faith?

Issues

[10] The issues for resolution are:

(i) whether the redundancy of the Applicant's position was made for genuine commercial reasons, and not for any other predominant, ulterior purpose; and

(ii) whether the redundancy was carried out in a fair manner and in accordance with the requirements of the Applicant's terms of employment; and

(iii) if the Applicant does establish a grievance on either or both grounds, what remedies are required, after considering:

(a) what she did to mitigate any losses; and

(b) whether any remedies should be reduced because of blameworthy conduct by the Applicant that contributed to the situation giving rise to her grievance?

The background

[11] From the written and oral evidence, I find the following facts relevant to resolution of this employment relationship problem.

[12] The Applicant began work for the Respondent on 2 May 2005. Her employment followed the Respondent gaining the New Zealand distribution agency for specialised medical equipment produced by a Japanese company, Fujinon.

[13] The Applicant was familiar with Fujinon equipment because the company she previously worked for had the Fujinon distribution agency until it was gained by the Respondent in April 2005. In closing submissions Applicant counsel summarised the situation as the Applicant having brought the Fujinon agency with her.

[14] Earlier in 2005 she had met with Mr Hubbert to discuss whether the Respondent might be able to gain the agency and how to go about it. They agreed that if the Respondent was successful in obtaining the agency, it would employ her to sell the product.

[15] The Applicant helped prepare a presentation by Mr Hubbert to Fujinon's Australian managing director Masao Sato. She also prepared a business plan for the Respondent which analysed the market and forecast direct sales of Fujinon products worth $800,000 in 2005 and tripling over the following two years. It projected a nett loss in the first year but profits of more than one million dollars in 2006 and considerably more than that in 2007.

[16] The Respondent signed a distribution agreement with Fujinon running from 1 May 2005 to 30 April 2006. It was to be renewed annually.

[17] The Applicant was formally offered a position as an "*endoscopy specialist*" on 19 April 2005 with a "*starting salary*" of $80,000.

[18] Although no written employment agreement was finalised and executed by the parties, drafts were exchanged. The latest of those had been proposed by the Respondent and returned with some handwritten amendments proposed by the Applicant. I am satisfied that it was these terms of employment by which the Respondent considered itself bound and the Applicant had accepted subject to the amendments she proposed. None of those proposed amendments are relevant to the present matter.

[19] The key terms relate to redundancy and sales targets.

[20] Mr Hubbert accepted during questioning that the Respondent had committed itself to the following terms regarding termination for redundancy:

> *12.7 Redundancy means a situation where the Employee's employment is liable to be terminated, wholly or mainly, whether the Employee's position is, or will become, superfluous to the needs of the Employer.*
>
> *(a) The parties acknowledge that the employee has been recruited by the employer mainly to promote and service the Fujinon product range. It is therefore agreed that should the employer's Fujinon agency come to an end for whatever reason, the employee's position will be deemed to be redundant, and the provisions of 19.9(b) shall be reduced by one half.*
>
> *12.8 Where the position of the Employee has become redundant, the Employer shall inform the Employee of the prospect of redundancy and discuss with the Employee their views and preferences regarding the implications of the redundancy for the Employee. In particular, the parties shall explore the prospect of re-deployment within the Employer's organisation.*
>
> *12.9 Where re-deployment is not feasible and the employee's employment is terminated:*
>
> *(a) The employer shall give the employee notice of the termination of their employment pursuant to clause 12.1 hereto;*
>
> *(b) Redundancy compensation shall be payable as follows:*
>
> *(i) In the event that the employee's employment is terminated within the first year of employment: 4 weeks salary;*
>
> *(ii) In the event that the employee's employment is terminated after the first year of employment: 4*

> *weeks salary for the first year and one week for every additional year.*
>
> *12.10 Where economic conditions are such that existing hours cannot be sustained by the Employer, the Employer will consult with the Employee to determine an alternative arrangement regarding a reduction of work hours. In the event that an acceptable outcome cannot be achieved through negotiation in good faith, the Employee's position will be deemed to be redundant.*

[21] Clause 12.7 (a) was inserted at the request of the Applicant through her lawyer at the time.

[22] Clause 12.1 provided for a one month notice period that the Respondent could elect to pay in lieu.

[23] A schedule headed "*Calibre's Prescribed Effects*" set out what could be described as company objectives and sales targets, the latter incorporating figures from a business plan prepared by the Applicant. These included a target to reach by 1 May 2006 ($800,000) and another by 31 March 2007 ($1.5 million).

[24] Another schedule set out the duties of the Endoscopy Sales Specialist position, the salary and benefits including use of a car, payment for a mobile phone, medical insurance and an airline club membership.

[25] The Applicant began working from the Respondent's Auckland offices but in October 2005 moved to Wellington and set up an office in her own home there. The move was at her insistence and for reasons of her own. She had made not living in Auckland a condition of accepting the job.

[26] The sales position and her duties required travel throughout the country but with the Applicant concentrating on the South Island and lower North Island. Ms Laanbroek was primarily responsible for the upper North Island.

[27] While the Applicant was employed primarily to sell Fujinon endoscopy equipment, she was also required from the beginning of her employment to help generate cashflow by selling Soluscope equipment, which was also used in endoscopy procedures in hospitals.

[28] In an October 2006 memorandum written by the Applicant to Ms Laanbroek and copied to Mr Hubbert, the Applicant described this arrangement as something "*we have both agreed and discussed extensively*" although it had "*not been ideal for me or the Fujinon agency*".

[29] The Applicant proposed that she halve her time between promoting Soluscope and Fujinon sales, because until that time she had been allocating around 80 per cent of her time to Soluscope work.

[30] Her memo was headed "*Request for bonus payments*" and suggested she be paid bonuses on sales made in each six-month period. It listed 27 hospitals or health boards where the Applicant said she had been involved in "*actual sales and pending actual sales confirmations and activity*". Few involved actual sales of Soluscope or Fujinon products. Most refer to "*activity*" and "*presentations*".

[31] In February 2007 the Applicant attended a sales division meeting with Mr Hubbert, Ms Laanbroek and a newly appointed manager John Murray. Minutes of the meeting show that Mr Hubbert referred to the company having been "*running at a loss for two years consecutively*". The Applicant spent some time setting out her views on additional resources the Respondent needed to invest in order to boost sales, particularly of Fujinon products. When Mr Hubbert said the Respondent did not have the funds for that investment, the Applicant told him that it was his job to "*find the money*".

[32] During February Mr Hubbert spoke with the owner of the Australian company with the distribution rights for Soluscope there about whether that business might be interested in investing in the Respondent's business. The answer was no.

[33] On 21 March 2007 Mr Hubbert had an unexpected meeting with Mr Sato of Fujinon Australia. He was aware that Mr Sato was visiting New Zealand in March and might want to meet him. On 20 March arrangements for a meeting with Mr Sato were confirmed.

[34] For some time Mr Hubbert had been considering not renewing the Fujinon distribution agency due to expire on 30 April 2007. By 21 March he had decided to tell

Mr Sato that the Respondent would not seek to renew his agency. Before the meeting he prepared a letter to Mr Sato formally advising him of that decision. He gave Mr Sato the letter at the meeting. The letter also asked Mr Sato to consider directly employing the Applicant to work for Fujinon Australia.

[35] Before speaking with Mr Sato on 21 March Mr Hubbert had not told Ms Laanbroek or the Applicant of his decision to end the Fujinon agency.

[36] Following the meeting with Mr Sato on 21 March, Mr Hubbert rang the Applicant told her of his decision not to renew the agency. The Applicant asked whether she could be redeployed into solely Soluscope sales. She suggested the Respondent not go ahead with the appointment of a recently appointed technician but have Ms Laanbroek take over that role while the Applicant concentrated on sales. Mr Hubbert told her that the Respondent needed more sales of Soluscope products but could not afford the Applicant's salary or the position. He also told her that there was no real prospect of the Australian distributor of Soluscope investing in the Respondent's business by means such as subsidising a salary. He sent the Applicant a copy of his letter to Mr Sato, which included the suggestion of Fujinon employing her directly.

[37] After consulting an employment advisor Mr Hubbert sent the Applicant a letter by email three days. The letter including statements that:

(i) the decision not to renew the agency "*may have come as a surprise to you*"; and

(ii) the Applicant's "*position may become redundant in consequence*"; and

(iii) Fujinon sales were "*only 10 per cent of expectation*"; and

(iv) Redeployment of the Applicant was difficult because of her "*choice to live in Wellington, while our premises are in Auckland"*.

[38] The letter also said that neither of the Applicant's suggestions for alternatives – redeploying Ms Laanbroek rather than employing a new service technician and seeking a salary subsidy from the Australian Soluscope distributor – was practical but other suggestions would be welcomed.

[39] On 4 April the Respondent gave the Applicant one month's notice of redundancy in writing. It offered her four weeks salary as redundancy compensation and time off during the notice period to attend interviews for other jobs.

Was redundancy for genuine reasons or was an ulterior motive predominant?

[40] I am satisfied that there were genuine commercial reasons for the Respondent's decision to end its distribution agency with Fujinon, with the inevitable consequence regarding the viability of the Applicant's position. I need not set out the content of the financial information of the Respondent revealed during the investigation but am satisfied from it that sales of its medical applications division – for both Soluscope and Fujinon – were below its expectations for sustaining the sales positions of both the Applicant and Ms Laanbroek.

[41] That was a business decision which the Respondent was entitled to make. And, although the Applicant had significant ongoing involvement with Soluscope sales, it was also a legitimate exercise of the Respondent's management discretion to prefer the retention of its existing sales manager, Ms Laanbroek, for that work.

[42] The Applicant was originally intended to work primarily, if not exclusively, on generating sales of Fujinon equipment but in fact also spent a large part of her time promoting Soluscope equipment. This, in part, contributed to the failure to sell more Fujinon equipment but this was only in part as Soluscope sales also gave the sales representatives an 'in' to talk to those clients about whether they could also use Fujinon products. And it was clear that the Applicant throughout understood and accepted the Respondent's need to generate cash flow from sales of whatever products it could make. The Applicant's own memo of October 2006 seeking bonus payments referred to having "*agreed and discussed extensively*" the need to work on selling Soluscope products. The viability of her position depended on both and the resulting effect on her ability to sell Fujinon products does not negate the genuineness of the decision about the position.

[43] I note too that the Respondent had also made decisions to make redundant either before or since that time the positions of one manager, one office administrator and three other staff.

[44] There was some suggestion in the Applicant's evidence that the Respondent continued to carry out work for Fujinon despite her redundancy. The Respondent explained that it has acted as a "*go between*" for some customers who have both Soluscope and Fujinon equipment and that it has permission to sell some residual stock but this evidence does not establish the Applicant's assertion to any level which negates the genuineness of the Respondent's decision to disestablish her position.

Ulterior motive not established

[45] The Applicant's evidence suggested that the decision to make her position redundant was a form of retaliation by Mr Hubbert because she had refused what she called "*sexual advances*". Three instances were identified to support that contention:

(i) in June 2005 Mr Hubbert was said to have briefly put his head on the Applicant's shoulder while she was talking to Ms Laanbroek at the Respondent's offices; and

(ii) in December 2005 Mr Hubbert was said to have made distressing comments about the death of the Applicant's father while meeting at a café and discussing the Respondent's business prospects; and

(iii) in November 2006 Mr Hubbert was said to have telephoned the Applicant's motel room while they were both attending a medical conference and asked if he could come to see her in her room.

[46] I am not satisfied that any of those events amounted to sexual advances as alleged or support the inference that the redundancy of the Applicant's position was decided with an ulterior motive of retaliation.

[47] Mr Hubbert does not deny the head-on-shoulder incident however the presence of Ms Laanbroek suggests it was a light-hearted albeit inappropriate gesture. He denies having made a phone call to the Applicant's room. However if the call was made, there is nothing inherently suspicious about a company director wanting to meet with the company's sales representative during the evening of a conference which they were both attending to develop contacts with potential customers. The innuendo of the Applicant's evidence is that something more was meant by the word "see" but there is nothing more to support the inference she wants drawn and I decline to do so.

[48] Similarly the evidence regarding the December 2005 café conversation does not support any conclusion of inappropriate sexual conduct by Mr Hubbert. However some of the content of the conversation was offensive for different reasons.

[49] Mr Hubbert had arranged to meet the Applicant at a café to discuss business matters. Mr Hubbert knew that the Applicant's father was burnt to death in an air accident. In the course of explaining the financial pressure that the company was under and the need for the Applicant to generate more sales, Mr Hubbert said he did not want the company to "crash and burn" in the way that the Applicant's father had. Mr Hubbert accepts that this comment was inappropriate and has apologised for it. Understandably it caused the Applicant to cry at the time it was made. It was personal information being used inappropriately to make a business point. However the Applicant's evidence was that a friend visiting the café at the time had intervened and asked if the Applicant was alright and she assured her that she was. While the remark was undoubtedly foolish, it did not amount to the kind of conduct now alleged by the Applicant.

Was redundancy carried out in a fair way?

[50] I find that the way that the Respondent ended the Fujinon distribution agency, told the Applicant about it, and carried out the redundancy of her position was a breach of the terms on which it had employed her and its statutory good faith obligations to her.

[51] The Applicant's terms of employment included an express term providing for the redundancy of her position "*should the employer's Fujinon agency come to an end for whatever reason*". The redundancy was – to any neutral observer – a foregone conclusion when Mr Hubbert made the decision, by at least 20 March 2007, to tell Mr Sato on 21 March that the Respondent would not seek to renew the agency agreement.

[52] While Mr Hubbert had some indication of the Applicant's views from their February staff meeting – and a firm view on the impracticality of her suggestion that he should simply get more money – he should have talked with her about the likely effect of that decision before speaking with Mr Sato. Not to do so was a clear breach of the statutory duty of good faith regarding proposals that might "*impact*" on an employee.

[53] There was an important, practical reason for Mr Hubbert speaking with the Applicant before talking with Mr Sato. Mr Hubbert prepared a letter for Mr Sato before meeting him which made a specific recommendation that Fujinon Australia consider employing the Applicant directly. While Mr Hubbert was well-intentioned in seeking continuity of employment for the Applicant, she at the very least deserved the courtesy of being asked whether that was a proposal she wanted to have made on her behalf.

[54] When he did speak to the Applicant on 21 March it is also clear that the die had been cast regarding redundancy of the position. By telephone – announcing the decision out of the blue – Mr Hubbert told her that even if she could not generate more Soluscope sales, "*I can't afford your salary, I can't afford the position*". His subsequent letter of 23 March, to the limited extent that it was consultation, was consultation about the effect of the redundancy on her, not its fact or any real consideration of alternatives.

[55] That was less than what a fair and reasonable employer would have done in all the circumstances at the time and is consequently unjustified.

[56] In the month following formal notice of the redundancy between 4 April and the last day of work in early May 2007 there were a state of considerable tension between the Applicant, Ms Laanbroek, Mr Hubbert and, eventually, the parties' legal representatives. This resulted in the Respondent deciding to cut the Applicant's internet and phone access and acrimony in the last few days of her employment over the return or exchange of company and personal property. I have, after considering the respective evidence of witnesses and the heated correspondence between the representatives during this period, decided to take no further account of it as I do not accept either party's version as sufficiently candid or blame free.

Determination

[57] For the reasons given, I find that the redundancy of the Applicant's position was for genuine commercial reasons but she has a personal grievance arising from manner of the redundancy announcement and inadequate consultation with her.

Remedies

[58] Having found that the Respondent's decision regarding redundancy of the Applicant's position was made for genuine reasons without predominant ulterior motive, the Applicant's claim for lost wages and benefits cannot be considered.

[59] She is entitled to be compensated for humiliation, loss of dignity and injury to feelings caused by the suddenness of the Respondent's decision after having failed to consult her about the proposal to end the agency, and, realistically, her position.

[60] This is not compensation for the loss of the job itself. The Applicant's evidence referred to the "*embarrassment*" of being made redundant. This is an unfortunate consequence of the Respondent's genuine commercial decision. Similarly while the Applicant found it difficult to find another job and had to borrow from friends to make ends meet and cover some expenses previously met by the Respondent, these are not sums that can properly be compensated for under this head.

[61] Neither do I accept that distress compensation should extend to other alleged subsequent conduct of the Respondent's managers whom the Applicant says 'bad mouthed' her to some prospective employers. As the Applicant herself said, her particular industry of sales of medical and specialist products was a small one in which news travelled fast and the source of rumours, accurate or otherwise, about the situation cannot definitively be traced to the Respondent on the limited evidence available from the Applicant.

[62] Similarly, while how the Applicant heard about the loss of her job was somewhat brutal, it cannot, realistically have been a complete shock to her. She disputes the evidence of Mr Hubbert and Ms Laanbroek about various discussions with her between October and December 2006 about the parlous financial state of the company and its desperate need for sales but I am not satisfied that she was as in the dark as she has subsequently asserted. At the very least she was aware from what Mr Hubbert said – albeit reinforced by insensitive imagery – at their café meeting in December that he was very worried about the company's future. And by the time of the February 2007 staff meeting, she realistically must have understood there was some risk to her own job security.

[63] The Applicant was, however, clearly hit hard by the sudden loss of her position. She enjoyed the status of working in sales of specialised medical equipment as compared with the area of general medical supplies in which she has worked since August 2007. On the unchallenged evidence of her psychologist, she experienced anxiety and depression in the months immediately following the termination of her employment, with the risk of developing a major depressive episode. She was tearful and suffered sleeplessness, headaches and hyper-arousal affecting her breathing.

[64] Weighing all the factors in the particular circumstances of this case, and the general range of awards in cases of this kind, an award of $6000 under s123(1)(c)(i) of the Act is required to compensate the Applicant for humiliation, loss of dignity and injury to her feelings.

[65] The Applicant's terms of employment also entitled her to a redundancy compensation payment of three weeks salary. This has not been paid because she refused to accept four weeks pay offered to her as compensation. The Respondent remains liable to pay her the three weeks of her entitlement.

[66] The Applicant had also sought an order for return of some of her personal books she said were still held by the Respondent. I decline to make such an order as the evidence did not establish that any such material was in the control or possession of the Respondent.

[67] The Applicant sought one additional day of holiday pay which she says was not properly included in her final pay. The Respondent did not establish that it had correctly paid all leave owing. I accept, in the absence of evidence to the contrary, that the Applicant is owed one additional day's pay and the Respondent is ordered to pay that to her.

Contribution

[68] As required under s124 of the Act I have considered whether any remedies awarded to the Applicant should be reduced because of blameworthy conduct by her which contributed to the situation giving rise to the grievance.

[69] The Respondent's notice of redundancy of 4 April 2007 acknowledged that the redundancy was an outcome of its "*inability to continue to fund the necessary marketing*" and did "*not imply any personal criticism*".

[70] Neither was the Applicant responsible for the Respondent's failure to consult her about its plan not to renew the agency agreement. Accordingly no reduction for contribution is necessary.

Costs

[71] The parties are encouraged to resolve any issue of costs between themselves. If they are unable to do, the Applicant may apply to the Authority for a determination of costs within 28 days of the date of this determination. The Respondent will then have 14 days to reply.

[72] The following preliminary view may assist the parties resolve the matter themselves. In the absence of presently unknown special or particular circumstances, costs in a case of this kind would likely be set by applying the approach and principles summarised in *PBO v Da Cruz* [2005] ERNZ 808 at [43]-[47].

[73] The Respondent's failure to provide all relevant documents resulted in an adjournment of the first scheduled date of the investigation meeting. Taking that delay into account, if a tariff approach were used to determine costs, the period to which it would apply totals two-and-a-half days.

Summary of decision

[74] The decision to make the Applicant's position was made for genuine commercial reasons without ulterior motive.

[75] The Respondent failed to properly consult with the Applicant about the prospect and process of making her position redundant and its actions were consequently unjustified.

[76] The Respondent is to pay to the Applicant the following remedies in settlement of her personal grievance:

(i) $6000 in compensation under s123(1)(c)(i) of the Act;

(ii) Three weeks wages as redundancy compensation under clause 12.9 and 12.7 of her terms of employment;

(iii) One day's holiday pay.

[77] The Applicant may apply to the Authority for a determination of costs if the parties cannot resolve that matter themselves.

Robin Arthur
Member of the Employment Relations Authority