Determination Number: AA 170/05
File Number: AEA 1240/04

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Luisa Havili (Applicant)
AND	Seamart (Wholesale) Limited (First Respondent) **AND** Glenn Lange (Second Respondent)
REPRESENTATIVES	David Fleming for Applicant No appearance for Respondents
MEMBER OF AUTHORITY	Vicki Campbell
INVESTIGATION MEETING	24 March 2005
SUBMISSIONS RECEIVED	29 March 2005
DATE OF DETERMINATION	10 May 2005

DETERMINATION OF THE AUTHORITY

Preliminary matter

[1] The respondents in this matter, Seamart (Wholesale) Limited ("Seamart") and Mr Glenn Lange, did not attend and were not represented at the investigation meeting. I accept both respondents have been served with the statement of problem. The Authority's records indicate that was so and Mr Lange contacted the Authority on 26 January 2005 and advised that he had posted the statement in reply the previous week, although this has never been received by the Authority.

[2] A notice of investigation meeting was sent to the registered address of the company, and again the Authority's records indicate that it was received. Service at a company's registered address is sufficient to effect service under regs 16 and 17 of the Employment Relations Authority Regulations 2000. I am satisfied that Mr Lange has been served with notice of the investigation meeting because the Authority's records indicate that it was served and Mr Lange contacted the Authority prior to the investigation meeting and advised he would be in attendance.

[3] The meeting was delayed to allow for the situation that the respondents had been unavoidably detained. However, as there was neither an appearance for, nor contact from, the respondents to explain the absence, I have proceeded to determine the matter in accordance with the Second Schedule to the Employment Relations Act 2000.

Employment relationship problem

[4] Ms Havili was employed by Seamart as a boner but throughout her employment she carried out the work of both boner and cutter. Ms Havili explained that the difference between the two jobs is that a boner takes the bone out of the fish from the side, while a cutter fillets the fish.

Ms Havili was one of two union delegates working at Seamart's Penrose premises. The other union delegate was her sister, Ms Patea Faleafa. Ms Havili and Ms Faleafa worked on the night shift.

[5] Ms Havili claims she was unjustifiably disadvantaged in her employment when Seamart did not adequately investigate a complaint of assault she had made against her supervisor. Ms Havili says she was pushed by the leading hand, Mr George Puloka, after she had attempted to obtain copies of her pay slips. Ms Havili claims Seamart failed to take adequate measures to ensure her safety in the workplace. Ms Havili raised a personal grievance with Seamart in relation to the assault.

[6] In August 2004 and after Ms Havili had raised her personal grievance for disadvantage, she was made redundant. Ms Havili was advised that the redundancy was a result of Seamart's intention to casualise the workforce. Ms Havili says the reasons for dismissal were not genuine and the process used by Seamart was unfair and unreasonable and claims the dismissal is unjustifiable.

[7] In addition, Ms Havili says that the casualisation of her position was a breach of the collective employment agreement and claims a penalty against both Seamart, and Mr Lange personally, for the breach.

[8] The issues for determination are:

- Was Ms Havili disadvantaged in her employment?
- Was the redundancy genuine?
- Was the redundancy carried out in a fair and reasonable manner?
- Was there a breach of the collective employment agreement?

Was there an unjustified disadvantage?

[9] The provision of a safe working environment is required by law and failure to do so may give rise to an unjustifiable disadvantage (*IHC Northern Vocational Services v Jordan*, unreported, Shaw J, 7 May 2004 AC25/04). The onus is initially on Ms Havili to demonstrate to my satisfaction that there was an action affecting her employment to her disadvantage (*Airline Stewards and Hostesses IUOW v Air New Zealand Ltd* [1989] 2 NZILR 883). The onus then shifts to the employer to demonstrate that what it did was reasonable and thereby justified (*Canterbury Hotel etc IUOW v Menage Entertainments Ltd* [1987] NZILR 336).

[10] On 10 June 2004, Ms Havili's pay was late being paid by two days. She went to the office and asked Mr George Puloka, the supervisor, to show her, her payslip so that she could check it. Mr Puloka had a number of pay slips but refused – he put the payslips into a drawer and turned off the light in the office. He then pushed Ms Havili. This altercation was witnessed by Ms Havili's sister, Ms Faleafa. Ms Havili says she became scared of Mr Puloka and was shaking after the event.

[11] Ms Havili waited for two days for Mr Puloka to apologise for the incident. When the apology was not forthcoming Ms Havili made a formal complaint to the company.

[12] Independently of each other, both Ms Faleafa and Mr Syd Keepa, the union organiser, raised the 10 June 2004 incident with Mr Glen Lange, a manager for Seamart. Mr Lange told Mr Keepa that he would investigate the incident.

[13] Mr Keepa told me that on 15 June 2004 Mr Lange telephoned him and advised him that he [Mr Lange] had spoken to Mr Puloka who said he had brushed past Ms Havili but that he did not intentionally push her. In a statement dated 31 June 2004, Mr Puloka is silent about whether he brushed past Ms Havili or touched her in any way. After receiving Mr Puloka's statement Seamart advised Ms Havili that Mr Puloka had denied assaulting her and there was nothing more they could do.

[14] Ms Havili told the Authority that following the incident on 10 June 2004, she felt Mr Puloka was urging her to make mistakes which could lead to her dismissal. As an example she says that on one shift Mr Puloka was working behind her. Ms Havili was boning Terrikihi which weighs about 600 kilos. Mr Puloka told her to bone the Gurnard which weighs about 200 kilos. Ms Havili knows that Seamart policy is to bone the heavy fish before the lighter fish. She felt his instructions, if she followed them, would get her into trouble.

[15] Mr Puloka was Ms Havili's supervisor. Ms Havili felt very strongly about the incident on 10 June 2004. She has never before been pushed or hit by a male. She complained to management who appear to have simply accepted the word of Mr Puloka without giving any consideration to how Ms Havili was feeling in the workplace. When it appeared management had failed to take any action against Mr Puloka, Mr Keepa on Ms Havili's behalf raised a personal grievance for assault. In the letter raising the personal grievance Mr Keepa advised Seamart that Ms Havili and other members "*…feel threatened by your staff member being in the position he is in.*"

[16] I am satisfied that Ms Havili suffered a disadvantage in the workplace as a result of the actions of her supervisor. There is no evidence that Seamart's apparent lack of action in addressing Ms Havili's complaint about the alleged assault was reasonable and therefore justifiable.

I find Ms Havili has a personal grievance for unjustified disadvantage.

Was the redundancy genuine?

[17] It is an employer's prerogative to organise its business as it sees fit (*Aoraki Corporation Ltd v McGavin* [1998] ERNZ 601), however any redundancy should be aligned to some genuine commercial need (*NZ Nurses Union v Air NZ Ltd* [1992] 3 ERNZ 548).

[18] In June 2004, just after Ms Havili made her complaint about Mr Puloka, and during a meeting about the incident, Mr Lange told Ms Havili that he was going to make some redundancies. He told her he needed to restructure as the company profits were down and that unfortunately it would be the two union members (Ms Havili and Ms Faleafa) who would go.

[19] On Monday, 2 August 2004 Mr Lange called Ms Faleafa and Ms Havili into his office. On this day he advised Ms Havili she may be made redundant as a result of automation and that the boning crew was to be made casual. In answer to questions, the Authority was told that the plant at Penrose has not been automated, but casual employees have been engaged to work the same hours as Ms Havili had been working.

[20] On Tuesday 3 August 2004 Mr Lange telephoned Mr Keepa and requested a meeting to discuss possible redundancies. Mr Lange confirmed to Mr Keepa that the employees affected were Ms Faleafa and Ms Havili. Mr Lange and Mr Keepa met the following day. Mr Keepa told the Authority that Mr Lange said he was going to do away with the boning crew and would casualise the staff.

[21] I am satisfied that the reason for the redundancies was to allow the company to casualise the staff at Penrose. There was no evidence from Seamart as to the commercial necessity for this strategy.

I find that in all the circumstances Ms Havili's redundancy was not genuine.

Was the redundancy implemented in a fair and reasonable way?

[22] In *Aoraki* the Court of Appeal held that it is for the employer to decide on which positions should be dispensed. However, the employer is obligated to implement such strategies by dealing with employees in good faith. The actions of an employer must meet the standard required of a reasonable employer acting fairly and consultation is desirable, if not essential, in most cases (*Coutts Cars Ltd v Baguley* [2001] ERNZ 660).

[23] Mr Lange advised Ms Havili as early as June 2004 that it would be the two union delegates who would be made redundant at the Penrose site. This decision preceded any consultation with the two affected employees or the union organiser.

[24] The transcript of the meeting held on 2 August 2004 shows that Mr Lange advised Ms Havili and her sister that they would be the two people made redundant as they were the only two permanent staff doing boning. He told Ms Havili and Ms Faleafa that options available to them were to be made cutters or come back as casuals. Ms Havili reminded Mr Lange that she was a cutter as well as a boner. Mr Lange told both employees to come back Monday and in the meantime he would contact Mr Keepa at the union. Mr Lange also advised Ms Havili and Ms Faleafa that they would receive 1 weeks notice as that was Seamart policy.

[25] On the following day Mr Lange contacted Mr Keepa and made it clear that there would be redundancies and the two staff affected would be Ms Havili and Ms Faleafa.

[26] There is evidence that Seamart considered alternatives to making Ms Faleafa redundant. Ms Faleafa was redeployed to a similar position at Seamart downtown. However, there is no evidence that any alternatives were considered for Ms Havili. At the 2 August meeting, Ms Havili offered to do packing work and reminded Mr Lange that she was also a cutter and could undertake a cutter's job. There is no evidence that either of these suggestions were considered by Seamart.

[27] On 16 August 2004 Ms Havili was provided with one week's notice of redundancy.

[28] The consultation process followed by Seamart has the hallmarks of a sham. It was clear as early as June 2004 (coincidentally just after Ms Havili had raised her personal grievance) that Ms Havili would be made redundant. Mr Lange told her as much.

I find the redundancy was not implemented in a fair and reasonable manner and that Ms Havili was unjustifiably dismissed.

Was there a breach of the collective employment agreement?

[29] Ms Havili claims casual employees were employed to fill her position and that this is a breach of the employment agreement. Clause 6.1 of the employment agreement states:

> *Casual employees will not be employed if full-time or part-time employees are willing and able to perform the duties. The employment of casual and part-time employees is not intended to deteriorate*

the employment of weekly employees, but exceptions may arise where the employer has legitimate health and safety concerns over employees working excessive amounts of overtime.

[30] The evidence shows that on 2 and 3 August Mr Lange made it clear that his intention was to casualise Ms Havili's and Ms Faleafa's positions. In the meeting on 4 August 2004 Mr Keepa drew Mr Lange's attention to clause 6.1 in the collective employment agreement and advised him that if he wished to replace permanent staff with casual staff a variation to the collective would be required.

[31] Ms Havili made it clear to Mr Lange on 2 August 2004 that she remained willing and able to perform her duties. Evidence provided to the Authority shows that since Ms Havili's dismissal, at least 8 new staff have been hired by Seamart and are working full time hours doing cutting and boning work.

[32] Under clause 6.1 the only exception to the agreement not to employ casual staff to the detriment of weekly employees was in relation to health and safety concerns. No concerns about health and safety were raised with Ms Havili or the union when the decision to replace two weekly employees with casual staff was made.

The employment of casual staff while Ms Havili remained willing and able to perform the duties caused a deterioration to Ms Havili's employment (she was dismissed) and was a breach of the collective employment agreement.

Remedies

Lost earnings

[33] Ms Havili was able to secure permanent employment within a week of her dismissal. As she was paid one week's notice she has advised the Authority she did not lose any wages. I therefore make no order for reimbursement of lost earnings pursuant to s.128 of the Employment Relations Act 2000.

Compensation

[34] I have found that Ms Havili suffered both a disadvantage in her employment and that her dismissal was unjustifiable.

[35] Ms Havili provided the Authority with compelling evidence as to the effects the actions of her supervisor and subsequently the redundancy had on her. I balance the evidence of the effects of the redundancy with the fact that Ms Havili was able to find alternative employment within a week of her dismissal.

[36] In considering an award under s.123 I have decided it is appropriate to treat the compensation for the two causes of action globally and award one lump sum. The decision to make Ms Havili redundant arose at the same time as Ms Havili raised an employment relationship problem with Seamart regarding the assault. This was suspiciously coincidental.

Seamart (Wholesale) Limited is ordered to pay Ms Havili the sum of $5,000 for hurt and humiliation arising out of the unjustified disadvantage and unjustified dismissal, pursuant to s.123 of the Employment Relations Act 2000 within 28 days of the date of this determination.

[37] I am bound by s.124 of the Act to consider the extent to which the actions of Ms Havili contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies. I am satisfied no contribution arises in this matter.

Penalties

[38] Ms Havili seeks a penalty pursuant to s.134 against both respondents for the breach of her employment agreement. Penalties are imposed for the purpose of punishing a wrongdoer where there has been a breach of an Act or an employment agreement. In a recent Employment Court decision the Chief Judge set out some observations to assist the Authority when dealing with the issue of penalties (*Xu & Naenae Auto Service Station Limited v McIntosh*, unreported, WC13A/04, Goddard CJ, 18 November 2004). Chief Judge Goddard suggests the Authority should consider how much harm the breach has occasioned; whether it is important to bring home to the defaulter that the behaviour is unacceptable or deter others from it; and whether the breach was technical and inadvertent or flagrant and deliberate.

[39] In this matter the breach of the collective employment agreement resulted in Ms Havili losing her job. Mr Keepa warned Mr Lange that the employment agreement did not allow the company to employ casual labour when a permanent employee remained willing and able to undertake the work. This warning was ignored by Seamart. Immediately upon Ms Havili's dismissal, Seamart proceeded to employ casual staff to do her job. I consider this to constitute a flagrant and deliberate breach of the employment agreement. Such breaches must be discouraged and the sanctity of the collective agreement upheld.

Seamart (Wholesale) Limited is ordered to pay a penalty of $2,500 within 28 days of the date of this determination. Half of the penalty in the sum of $1,000 is to be paid to Ms Havili with the remaining $1,500 to be paid to the Authority for the Crown.

Is Mr Lange personally liable for the breach?

[40] Ms Havili claims a penalty against Mr Lange personally for inciting, instigating, aiding, or abetting the breach of the employment agreement pursuant to s.134(2) of the Act. There can be no doubt that Mr Lange was the architect of the dismissal. It was to Mr Lange that the union raised the issue about the compliance with the collective employment agreement. Mr Lange deliberately instigated the breach of the collective employment agreement when he chose to ignore the unions warning. In the circumstances I am satisfied Mr Lange's actions warrant the imposition of a penalty.

Mr Lange is ordered to pay a penalty of $500 to the Authority for the Crown within 28 days of the date of this determination.

Costs

[41] There is nothing in this case to derogate from the principle that costs follow the event and that the unsuccessful respondents should make a contribution to the applicant's reasonably incurred costs. In submissions the applicant sought a contribution to costs of $1,500. The hearing took ½ a day and was not a complex matter.

[42] In all the circumstances and taking into account the well known principles relating to costs I am of the view that an appropriate award of costs is $750.00.

Seamart (Wholesale) Limited and Mr Lange are ordered to pay to Ms Havili the sum of $750.00 as a contribution to her costs and disbursements.

Summary of Orders

- Seamart (Wholesale) Limited is ordered to pay Ms Havili the sum of $5,000 for hurt and humiliation arising out of the unjustified disadvantage and unjustified dismissal, pursuant to s.123 of the Employment Relations Act 2000 within 28 days of the date of this determination.

- Seamart (Wholesale) Limited is ordered to pay a penalty of $2,500 within 28 days of the date of this determination. Part of the penalty in the sum of $1,000 is to be paid to Ms Havili with the remaining $1,500 to be paid to the Authority for the Crown.

- Mr Lange is ordered to pay a penalty of $500 to the Authority for the Crown within 28 days of the date of this determination.

- Seamart (Wholesale) Limited and Mr Lange are ordered to pay to Ms Havili the sum of $750.00 as a contribution to her costs and disbursements.

Vicki Campbell
Member of Employment Relations Authority