

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2012] NZERA Auckland 251  
5349746

BETWEEN                      KATHARINA HECHT  
   Applicant  
  
A N D                              ERSON HOLDINGS LIMITED  
   Respondent

Member of Authority:      K J Anderson  
  
Representatives:              W Reid, Advocate for Applicant  
   S-J Davies, Counsel for Respondent  
  
Investigation meeting:      9 February 2012 at Hamilton  
  
Submissions Received      21 February 2012 from Applicant  
   9 March 2012 from Respondent  
  
Date of Determination:      25 July 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant, Ms Katharina Hecht, claims that she was unjustifiably dismissed, effective from on or about 27 May 2011. Ms Hecht asks the Authority to find that she has a personal grievance and award her the remedies of reimbursement of lost wages and compensation for hurt and humiliation. Conversely, the respondent, Erson Holdings Limited, says that due to the financial circumstances that faced the business in question, Tangiaro Kiwi Retreat, it was necessary to reduce the cost structure; and the position held by Ms Hecht was genuinely made redundant.

**Background**

[2] Erson Holdings Limited owns and operates a Coromandel holiday retreat; Tangiaro Kiwi Retreat (the Retreat). This business is owned and operated by

Mr John Clegg and Mrs Anne Clegg. They are also the sole directors and shareholders of Erson Holdings Limited. Mr and Mrs Clegg (the Cleggs) reside in Auckland and therefore are not always present in regard to the day-to-day operation of the business, albeit they travel to the Retreat every two weeks to observe and assist with the operation of the complex, and during the Christmas/New Year period, the Cleggs attend the Retreat every weekend. The facilities at the Retreat consist of self contained lodges as accommodation and there is a restaurant/café and a bar.

[3] The evidence of Mr Clegg is that in December 2009, Ms Hecht was employed as a casual waitress/kitchenhand. At that time the Retreat employed a chef, a bar manager and there was also a site manager. In March 2010, the people that occupied the above three positions, left their employment at the Retreat. There is some conflict in the evidence about the role of Ms Hecht upon the departure of the three incumbents. The evidence of Ms Hecht is that while initially, her job mainly involved working in the café kitchen, over a period of months (from December 2009 to March/April 2010), she learned to undertake other duties around the Retreat, including the use of the office computer and the booking systems. Ms Hecht says that she became the “Girl Friday” for the Retreat and by April 2010, she was one of the few remaining staff members apart from some casual staff. The evidence of Ms Hecht is that upon the departure of the three aforementioned permanent staff, she was:

*Essentially given the label of manager which meant that theoretically I was in charge on a day by day basis, however I went about my Girl Friday role doing all the tasks that I had been doing previously.*

[4] But the evidence of Mr Clegg is that in April 2010, Ms Hecht was asked to take over managing the restaurant and the accommodation. She was then employed fulltime. Ms Hecht was paid a salary of \$50,000 and business cards were printed identifying her as “*Manager*”.

[5] The relevance of this background to the appointment of Ms Hecht in April 2010 is that, as we shall see later in this determination, Ms Hecht says that the term manager was “simply a label” attached to her “Girl Friday” role and that she was never appointed to the role of manager. This issue will be explored in more depth later.

### **Conflict between Ms Hecht and other employees at the Retreat**

[6] Ms Hecht has given considerable evidence about various confrontations that arose between her and other employees at the Retreat, including a physical assault upon her by Ms J.<sup>1</sup> The Authority is not required to examine the various incidents that Ms Hecht has related to, except to assess whether there is any substance to the allegation made by her that by January 2011, the conflict at the Retreat had “reached a head”. Ms Hecht alleges that two employees (Ms J and Ms T) threatened to quit and take their families out of the Retreat unless she was dismissed. Ms Hecht says: “*basically I had to go*”. Ms Hecht alleges that the solution adopted by the Cleggs was to commence a redundancy process with the outcome being that her employment was eventually terminated.

### **Redundancy**

[7] The evidence of Mr Clegg is that the Retreat, as a business, had been largely subsidised from another business owned by Erson Holdings Limited. But the other business had suffered a downturn in profit which made it difficult to continue funding the Retreat. Mr Clegg says that matters came to a head in February 2011, at the initiative of their bank manager who wanted to know what the Cleggs intended to do about the losses the Retreat was incurring.

[8] The further evidence of Mr Clegg is that while some cost reduction measures were implemented at the Retreat, these were not sufficient and so the focus moved to assessing the wage bill in order to obtain further cost savings.

### **Consultation**

[9] Mr Clegg attests that upon coming to the realisation that the costs of employing staff would have to be reduced, Mr Terence Arnold, an employment relations consultant, was engaged. Mr Arnold gave the Cleggs advice about an appropriate process to be adopted. Consequently, on 19 February 2011, Mr and Mrs Clegg wrote to all the staff employed at the Retreat:

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<sup>1</sup> As the other employees that Ms Hecht had some conflict with are not directly involved in these proceedings, it is not appropriate to identify them.

Dear Staff Members

**Re: Preliminary notification of company restructure Tangiaro  
Kiwi Retreat**

The current economic conditions have forced the company to review and reorganise its business. These changes are necessary to achieve greater cost efficiency in the way we carry out our business in order to ensure the company's survival in the highly competitive market it operates. These changes are going to result in the creation of a new business structure, proposed changes to duties for some roles for which training will be provided, the proposed disestablishment of some roles and potentially redundancies. Individual consultation with affected staff about how these proposed changes will affect them will commence shortly. The company decision to review and organise its business will see both myself and Anne as managing directors taking a more hands on approach in the day-to-day operations of the company. A preliminary view of what the company may look like going forward indicate [sic] the disestablishment of the manager position due [sic] myself and Anne taking a more hands on involvement in the day-to-day operations of the business plus a rationalisation of support roles including bar, kitchen and office functions, however this will not be finalised one way or the other until the consultation period has been completed.

[10] Among other things, the letter informed the staff that a meeting would take place on Saturday, 26 February 2011, at which the Cleggs would outline their preliminary views and seek "further participation and contribution" to the consultation process. Whether the meeting for 26 February 2011 (referred to above) ever took place is inconclusive as there is no mention of such in the evidence of the respective witnesses. But via a letter dated 26 February 2011, Mr and Mrs Clegg conveyed to Ms Hecht:

As stated we need to improve our overall efficiency and reduce our operating costs. So I am sorry to have to inform you that we are proposing to disestablish your current position as manager. The role will no longer be needed as part of the business going forward.

[11] Ms Hecht was also given two organisation charts showing the current and proposed staff structure for the business. The proposed structure shows that rather than having a manager reporting to Mr and Mrs Clegg, there would be a cook/restaurant position, a bar manager/office coordinator position (including some reception and administration) and a gardener/handyman position. Casual staff would be employed to help cover seasonal peaks. The letter went on to inform Ms Hecht that:

I have considered whether you would be suitable for either of the revised roles but at this stage do not consider them right for you.

However, before making up my mind on this I would like your feedback, specifically on the proposal to disestablish your manager role and secondly on whether you want to be reconsidered for any of the available roles. I am attaching draft descriptions for each of the new roles for you to consider. If you are not appointed to one of the new roles then it is likely that you will be made redundant and you would be given notice terminating your employment. A meeting has been arranged for us to discuss this next Saturday March 5th at 12.30pm.

### **Meeting 8 March 2011**

[12] A meeting actually took place on 8 March 2011 (not 5 March). Ms Hecht was accompanied by her advocate, Ms Jan Autumn. Mr and Mrs Clegg had Mr Arnold in attendance. The process adopted by the employer was challenged by Ms Hecht and Ms Autumn but the outcome of the meeting appears to be that Ms Hecht indicated that she wished to be considered for the role of bar manager/office coordinator.

[13] Subsequently (15 March 2011), Ms Hecht received a detailed job description for the new role and also the proposed selection criteria. On 3 April 2011, Ms Autumn requested further information from Mr Arnold regarding the bar manager/office coordinator role and she also gave some feedback in regard to the restructure proposal. Mr Arnold responded via an email on 5 April 2011.

[14] Ms Hecht was interviewed for the bar manager/office coordinator position on 11 April 2011. Also interviewed for the role was Ms J, the incumbent bar person. The evidence of Mr Clegg is that Ms J scored higher than Ms Hecht. Mr Clegg says that Ms J was “better qualified” in regard to the office work which he says Ms Hecht was “struggling” with. The evidence of Mr Arnold is that Ms Hecht did not score high as a team player and his observation was that she would be better suited to a “stand alone” role. Subsequently, Mr Arnold had a discussion with the Cleggs about the possibility of retaining Ms Hecht in an advertising/marketing/public relations role. However, the Cleggs were of the view that introducing a new position would defeat the purpose of reducing costs.

[15] On 15 April 2011, Mr Arnold advised Ms Hecht (and Ms J) of the results of the interview assessment and he asked her for any feedback she may wish to make by 18 April 2011. Ms Autumn responded, in some detail, on 16 April 2011.

**Termination of employment**

[16] By a letter dated 19 April 2011, Ms Hecht was informed that she had been unsuccessful in regard to the bar manager/office coordinator position. Ms Hecht was also informed that her terms of employment provided for two weeks' notice and she may wish to be considered for casual work that may become available "on demand". Ms Hecht was also invited to put forward any other alternatives of employment for her.

[17] Finally, via a letter dated 28 April 2011, Ms Hecht was informed that having considered the feedback provided by her in letters dated 21 April and 25 April 2011, and in the absence of any alternative role for Ms Hecht, she was given notice of the termination of her employment at the Retreat; with the last day of employment being 27 May 2011. While the evidence is uncertain, the Authority understands that Ms Hecht may not have worked out the whole of the notice period.

**The reasons why Ms Hecht believes her dismissal on the grounds of redundancy was unjustifiable**

- a. First, it is submitted for Ms Hecht that the decision to make her employment redundant and the process followed to implement the redundancy, "are tainted by improper motive and bad faith".
- b. It is submitted that the employer made a decision that Ms Hecht "had to go" in order to resolve the conflict that had arisen between her and other employees; and Ms Hecht's dismissal was "inevitable".
- c. Ms Hecht says that she was not solely employed in the role of manager and that her engagement was as a hotel worker. It is submitted that the managerial duties were "an overlay of additional responsibility" that did not detract from the duties she was originally engaged to perform in December 2009.
- d. It is submitted that even if the Authority accepts that the redundancy process was initiated for genuine economic reasons, the process adopted was unfair because:
  - i. Ms Hecht was not consulted about the decision to disestablish her managerial role.

- ii. The employer never considered with an open mind the submissions made by Ms Hecht and Ms Autumn regarding the process adopted; and there was a pre-determined outcome.
- iii. The employer did not consider alternatives to employment with an open mind.
- e. In summary, Ms Hecht says that the Cleggs have failed to show that her dismissal was for genuine economic reasons and further, the role of Ms Hecht could have been “redefined” as an alternative to redundancy.

### **Analysis and conclusions**

[18] As with any dismissal, the test the Authority must apply is whether the decision to dismiss Ms Hecht on the ground of redundancy was what a fair and reasonable employer could have done in the circumstances.<sup>2</sup>

[19] And then, as was held by the Employment Court (Colgan CJ) in *Simpson’s Farms Limited v Aberhart*:<sup>3</sup>

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 section 103A.

[20] The above statement from the Employment Court is consistent with the findings of the Court of Appeal in *GN Hale and Son Limited v Wellington etc Caretakers etc IUOW*,<sup>4</sup> where the Court held that:

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 go to the wall. A worker does not have a right to continued employment if the business can be run more efficiently without him.

And:

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 unjustified dismissal.

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<sup>2</sup> Section 103A Employment Relations Act 2000

<sup>3</sup> [2006] ERNZ 825

<sup>4</sup> [1990] 2 NZLR 1079

[21] In a discussion about the statutory concept of unjustified dismissal, Richardson J stated that:

The statutory concept of unjustified dismissal is concerned with both the reason for the dismissal and the manner in which it was handled; with the substantive justification and with procedural fairness.

### **Application of the law to the circumstances of Ms Hecht**

*Was the redundancy of Ms Hecht's position genuine?*

[22] The submissions for Ms Hecht are critical about the genuineness of the need to make her position redundant. However, I found Mr Clegg to be a credible witness overall and in the absence of tangible evidence to the contrary; I accept that there was a genuine financial need to substantially reduce wage costs at the Retreat. The second aspect of the genuineness of the redundancy, relates to the allegation that Ms Hecht's employment was made redundant due to the continuing conflict between her and other employees and the threat by two of them, to resign from their employment at the Retreat. It is established that there were ongoing problems in regard to the relationship between Ms Hecht and other employees, and Mr Clegg acknowledged under cross-examination that matters came to a head in early 2011. But Mr Clegg also related to discussions that took place in meetings with all concerned and also to his discussions with Ms Hecht personally as well as involving another person to act as a mediator. Mr Clegg also says that he persuaded Ms J and Ms T to stay on working at the Retreat and that the conflict was resolved by having Ms Hecht working different hours to the other two women.

[23] Ms Hecht's advocate has vigorously sought to persuade me that the conflict between Ms Hecht and other employees was the principal reason why her employment was made redundant but I am not convinced - on the balance of probabilities - that this is so. Rather I find that it is more probable that given that Ms Hecht was being paid \$50,000 per annum, and given her role could be carried out by others, this was a genuine reason for making her employment redundant.

[24] A further argument for Ms Hecht is that she was not really the manager of the Retreat and that her duties were wider than that and hence her actual role was not redundant. But this argument conveniently ignores some tangible evidence that Ms Hecht was appointed as the manager of the Retreat in March/April 2010. Firstly,

Ms Hecht arranged to have business cards printed that declare her to be the “MANAGER” of the Retreat. This is consistent with the credible evidence of Mr Clegg who told the Authority that he: “...*definitely made her the manager. There was never any question that she was the manager.*” Mr Clegg says that Ms Hecht was previously paid \$15 per hour but upon her appointment as manager, it was agreed that she would be paid \$50,000 per annum. Additionally, she was permitted to take the company car home because: “...*she was in charge.*”

[25] Then in response to the restructuring proposal, in letters dated 21 April and 25 April 2011, from Ms Autumn on behalf of Ms Hecht, the following references are included:

- Both Katharina and I expressed at the 2 meetings we had with you that we understood and accepted that there was to be a restructuring process that would see the manager’s position disestablished.
- Yes, change the position of manager, we see the need for that, but to reduce staffing levels and still expect to have a viable, robust business does not make for a good business decision and in fact goes against what you purport to be the vision of Tangiaro.
- She is still the manager but is being treated abominably.
- One would expect that the manager would be the first one to be talked to, certainly as the manager was the only one that was going to be affected.
- As manager Katharina has access to and is aware of the contents of her predecessors IEA; and as she has not had an IEA she has told me this is the document she has been working within.

[26] It goes without saying that the foregoing extracts reveal that Ms Hecht accepted that she was indeed the manager of the Retreat and any argument to the contrary is simply not sustainable. Therefore on the weight of the material evidence before the Authority, I find that the redundancy of the position held by Ms Hecht was genuine.

**Was the process adopted by the employer, leading to the termination of Ms Hecht’s employment, procedurally fair?**

[27] It is argued for Ms Hecht that she was not consulted about the decision to disestablish her role as manager and that the employer did not have an open mind in regard to considering the feedback and submissions that she made. Ironically the latter

argument for Ms Hecht contradicts, to a large extent, the assertion that she was not consulted. On that matter I find that the consultation with Ms Hecht was not only exercised but in fact exercised to the nth degree. The various documents exchanged between the parties graphically illustrates that this is so.

[28] Further, I do not accept that the employer failed to consider alternative employment options for Ms Hecht, albeit she did not suggest any herself. The evidence of Mr Arnold is that he discussed possibilities with the Cleggs before the decision was made to terminate Ms Hecht's employment, but the financial reality was that any possible alternative was simply not viable.

[29] Finally, Ms Hecht says that her role could have been "redefined" rather than terminating her employment. I take this to mean that the skills of Ms Hecht could have been utilised in some other way. Ms Hecht never suggested at any time how this could be done and the submissions for her are silent in regard to how this might have been achieved.

### **Determination**

[30] In any redundancy situation it is always understandable that an affected employee will feel that they have been unjustifiably treated in regard to the termination of their employment. Indeed, it is not unusual for an employee to perceive that perhaps they are at fault in some way. But as has been expressed by the Courts on many occasions, it is the position that is redundant to the purposes of the business, not the individual that holds the position. While I have considerable empathy for Ms Hecht and the circumstances she found herself in, I find that the redundancy of her position was for genuine reasons and that the process adopted, culminating in the termination of her employment, was fair and reasonable. In summary, I find that the dismissal of Ms Hecht on the ground of redundancy was something that a fair and reasonable employer could do in all the circumstances. Ms Hecht does not have a personal grievance hence the remedies she seeks are not available to her.

### **Costs**

[31] Costs are reserved. The parties are invited to resolve that matter if they can, taking into account the outcome and that the investigation meeting was completed within a day and the usual tariff approach adopted by the Authority. In the event a resolution cannot be reached, the respondent has 28 days from the date of this

determination to file and serve submissions with the Authority. The applicant has a further 14 days to file and serve submissions.

**K J Anderson**  
**Member of the Employment Relations Authority**