

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 145
5350237

BETWEEN SELENA HORNE
 Applicant

A N D TE AWAMUTU
 RESIDENTIAL TRUST
 Respondent

Member of Authority: James Crichton

Representatives: Joanna Watson, Counsel for Applicant
 Dennis Quigan, Advocate for Respondent

Investigation meeting: 14 March 2012 at Hamilton

Date of Determination: 30 April 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Horne) alleges that she was unjustifiably dismissed by the respondent (the Trust) on 17 March 2011.

[2] Ms Horne had been employed by the Trust since June 2007 and was initially engaged as Office Manager. That appointment was apparently made as a consequence of a restructure.

[3] Within two years, a further restructure of the Trust's management was in prospect and Ms Horne's uncontested evidence is that she was advised of this by her manager in April 2009. Ms Horne, feeling insecure, sought alternative employment and was successful in securing an alternative position.

[4] Ms Horne resigned her position with the Trust with her final day at work being 16 July 2009. On her last day, Ms Horne was called to a meeting with her manager

and other representatives of the Trust and asked what it would take to have her stay. Ms Horne's evidence is that she sought job security and asked for that, while the Trust says that she asked for more money and was in fact given a significant salary increase. Either way, Ms Horne made the decision to relinquish the other opportunity and remain with the Trust.

[5] To some extent, the fact that the Trust sought to have Ms Horne continue in the employment must reflect its decision not to proceed with the restructure which prompted Ms Horne seeking alternative employment in the first place. Certainly the Trust protested at the investigation meeting that Ms Horne ought never to have been told by her then manager that her job was in jeopardy when, at the point that observation would have been made, no such decision had been taken.

[6] In May 2010, Ms Horne was diagnosed with cancer and had major surgery scheduled for 16 July 2010 together with chemotherapy to deal with the illness. It is common ground that Ms Horne told the employer she would be away from her role for three to four months. During the period from May to the date of her surgery in July, Ms Horne "*prepared and organised as much as she could to enable a smooth transition in her absence*".

[7] There is dispute between the parties as to how much of this organisation was successful; Ms Horne says that it was agreed during her absence that a woman called Moira Fox would "*cover the statutory reporting requirements, payroll, creditors and finalise the external audit for the financial year by the end of August 2010*". That evidence is not accepted by the Trust which says bluntly that during the period Ms Horne was away on sick leave, that critical work in the financial area was simply not attended to. The Trust seemed particularly concerned about monthly financial reporting to the Board because the absence of this information could lead to "*a failure to comply with the Ministry of Health financial management and audit contractual requirements ... (and therefore) could lead to the Ministry of Health funding to the Trust being withdrawn*".

[8] On 18 October 2010, Ms Horne commenced work again in a part time capacity, in reliance on a medical clearance to work 10-20 hours a week. Almost immediately it became apparent to Ms Horne that, to put it colloquially, "*the shop had not been minded*" while she was away. The annual accounts were not ready for

audit (as Ms Horne expected) nor had there been any reporting to the Board over the period that she was on sick leave.

[9] On 30 November 2010, Ms Horne was diagnosed with anxiety and depression and prescribed antidepressants and was returned to full time sick leave.

[10] By February 2011, Ms Horne was markedly better and to that end she spoke with her manager on 21 February, indicating a return to work was in prospect. On 28 February, Ms Horne telephoned her manager and intended to advise that she was about to get a return to work assessment and that actually took place on 1 March 2011.

[11] That same day, Ms Horne was contacted by Mr Quigan, the Trust's advocate, who wanted to meet to discuss a restructure which affected Ms Horne's position. That meeting took place on 4 March. Mr Quigan presented a written proposal, the thrust of which was to disestablish Ms Horne's position and replace the role with a contractor. There was a subsequent meeting on 14 March and another on 17 March in the latter of which Ms Horne was told that her position was redundant.

[12] A personal grievance was raised and a mediation failed to resolve the employment relationship problem so the matter proceeded to the Authority for determination.

Issues

[13] The questions that the Authority needs to determine are as follows:

- (a) What were the arrangements while Ms Horne was on sick leave;
- (b) Was the redundancy a genuine one;
- (c) Was the Trust's process fair and just?

What were the arrangements during the sick leave?

[14] There is dispute between the parties as to just what Ms Horne had arranged once she became aware that she would be away from work for a significant period as a consequence of her ill health. She says that she arranged for a contractor, Ms Fox, to effectively do all that was necessary during her absence. Ms Horne's evidence on the point is quite unequivocal; she says that Ms Fox was to "*cover the statutory*

reporting requirements, payroll, creditors and finalise the external audit for the financial year by end of August 2010”.

[15] However, when Ms Fox gave her evidence to the Authority, she was adamant that she “... *wasn't there to do the audit*” although she agrees that she was asked to cover the areas of “*statutory reporting requirements, payroll and creditors*”.

[16] Dealing first with the question of the audit, Ms Fox says that “... *it was expected that Selena (Ms Horne) would be back at work in time to do this*”. But on the facts the Authority heard, that is inherently unlikely. Ms Horne estimated that she would be away for three to four months. She left work on 14 July to undertake her treatment and she was back at work on 18 October 2010 on a part time basis. That is around three months, as Ms Horne had anticipated. But given that the Trust's financial year concluded at the end of June and Ms Horne was not back on duty (albeit on a part time basis) until 18 October, it seems highly unlikely that she would have been able to present the audited financial reports to the October Board meeting; indeed it seems much more likely that Ms Horne's evidence that Ms Fox was to “*finalise the external audit for the financial year by end of August 2010*” is the correct position.

[17] But this is not the only example of missed communication between these two women. Ms Fox gave evidence to the Authority that she did not realise that when Ms Horne returned to duty on 18 October 2011, she was coming back only on a part time basis because that was all the medical clearance allowed. Furthermore, she says that Ms Horne missed appointments with her to discuss matters. Ms Horne was obviously very anxious at that suggestion and could only offer the suggestion that she was not working full time as a possible explanation for her unavailability.

[18] There is no documentary evidence to assist the Authority in making a judgment about whose recollection of these events is to be preferred. Both women presented as credible and intelligent and having a regard for the other. The Authority's conclusion is, of course, on the balance of probabilities, but it prefers the recollection of Ms Horne to the recollection of Ms Fox. As the Authority has already noted, it seems inherently unlikely that Ms Horne, with her knowledge of the workload, would propose that Ms Fox was not to attend to the audit requirements and leave them untouched for a period of three months while she recovered from her treatment. Accordingly, the Authority thinks that Ms Fox is mistaken in her

conclusion that she was not supposed to attend to the audit requirements and that in fact that was part of what Ms Horne thought Ms Fox was going to be doing.

[19] Furthermore, both women agree that Ms Fox was to attend to what both of them called “*statutory reporting requirements*”. This seems to be a reference to the material the Trust itself was concerned about when it raised anxieties about the absence of monthly financial reporting to the Board during Ms Horne’s absence.

[20] Clearly, as a matter of fact, the finalising of the accounts for audit was not attended to during Ms Horne’s absence nor was the Board given regular financial reports. Given both Ms Horne and Ms Fox agree that there was an arrangement that Ms Fox would cover Ms Horne while the latter was sick and there is even some common ground about what she was supposed to do, it is difficult to criticise Ms Horne for failing to act in good faith in trying to set up the period that she would be away from her job.

[21] Conversely, it seems frankly extraordinary that the Trust did not address what plainly were obvious deficits to it, during Ms Horne’s absence on sick leave. The Trust had a management structure and one would have imagined that if things that were required were not getting done, they would be addressed. In that regard, Ms Plunkett, the Trust’s Manager, gave evidence to the Authority and indicated in her evidence that she had had no involvement whatever in the arrangements between the two financial people. But given the Trust’s anxiety about the failure to complete the audit and the absence of any financial reporting to the Board of the Trust during Ms Horne’s absence, one would have expected that the deficit would have been addressed.

[22] It is, in the Authority’s view, unreasonable for a good and fair employer acting in good faith to leave matters that are of concern to it to simply run on, rather than addressing them and identifying a resolution. Given the Trust’s failure to address the problem, it compounded the pressure on Ms Horne when she returned from her period of ill health and was clearly bewildered by the amount of work that was left for her still to do. That failure to act promptly by the Trust is not what a good and fair employer would do and will sound in compensation.

Was this a genuine redundancy?

[23] The Authority is not persuaded that this was a genuine redundancy at all. In that regard, the Authority accepts the thrust of the submission made on Ms Horne's behalf that by simply allocating Ms Horne's role to a third party, albeit that that third party was a contractor, it was not the case that the position had been disestablished at all and therefore was not redundant.

[24] Of course, the law is very clear that the Authority will be loathe to interfere in the proper management decisions of the employer. It is not for the Authority to make management decisions about the structure of the employer's enterprise. But that general principle of law is counterbalanced by the equally strong legal principle that Courts and Tribunals will strive to protect employees from unfair or unjust treatment, especially going to security of employment.

[25] The statement of principle by Cooke P in *G N Hale & Son Ltd v. Wellington etc Caretakers etc IUW* [1991] 1 NZLR 151 is generally taken as settling the role of the Authority in redundancy matters. His Honour said:

... 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 a right to continued employment if the business could be run more efficiently without him. The personal grievance provisions ... should not be treated as derogating 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.

[26] It follows that while the Authority cannot properly inquire into the management of the enterprise, it is still left to assess the genuineness or otherwise of the redundancy in the particular circumstances of each case, and to evaluate the procedure used by the employer, including the consultation process, in making the decision to dismiss.

[27] Dealing then in this section with the genuineness of the decision, the factual matrix suggests the Trust became anxious about the absence of financial reporting to its Board while Ms Horne was on sick leave. The Authority is satisfied that Ms Horne made proper arrangements for that reporting to continue while she was on sick leave and the fact that those reports were not prepared by Ms Fox is a matter which the

Trust, as a good and fair employer, ought to have addressed promptly, that is at the time, and not after Ms Horne returned to duty on a part time basis after recovering from her cancer treatment.

[28] Having established that level of anxiety about what the Trust's Board saw as fundamental aspects of its role, and understandably so, it decided at its Board meeting on 16 February 2011 to "*out source*" Ms Horne's role. This was put to Ms Horne as a proposal on 1 March but by then, of course, as the Authority has already noted, Ms Horne was talking to Ms Plunkett (her manager) about returning to full time employment.

[29] At the very least, the juxtaposition between Ms Horne's intention to return to duty (which the Trust knew about or ought to have known about) and its contemporaneous decision to propose to make her position redundant, must raise questions about the genuineness of the proposal. The very basis for the restructure was to overcome the deficits identified because of Ms Horne's absence on sick leave. But if she was about to return and the Trust knew that, or ought to have known that, one would have thought that might address the issue.

[30] But the Trust response would be to say that it was not just the actual absence of Ms Horne on sick leave but rather its realisation that any employee filling the role that Ms Horne filled, could place the Trust in a disadvantageous position by being away on sick leave or accident leave or even holiday leave at an inopportune time.. But if that argument were to be accepted at face value, no employer would ever employ any person in a key position because of the prospect that they might not be there when the employer needed them.

[31] Adding to the Authority's unease about the genuineness of this decision by the Trust, is the point the Authority has already made about the Trust's failure to promptly address the deficits it identified and the provision of services to it while Ms Horne was on sick leave. As the Authority has already noted, the Authority is satisfied that Ms Horne took all proper steps to make arrangements for her absence and for whatever reason, those steps that she took did not result in an adequate service to the Trust. That is a matter which the Trust ought to have taken up promptly with Ms Fox who was providing the services. It could not be said that the Trust and Ms Fox were remote the one from the other. In fact, Ms Fox was a member of the Trust from 14 June 2010 down to 16 March 2011; in fact, as those dates indicate, she

was a member of the Trust while the Trust was failing to get the information that it legitimately required from its financial person.

[32] As if that is not enough to raise anxieties about genuineness, the final point the Authority relies upon in its considered view that this was not a genuine redundancy at all is that Ms Fox was appointed the contractor to take over from Ms Horne once the restructure was finalised. Ms Fox told the Authority that she put in her proposal to do the work at the end of February 2011, that is, within a couple of weeks of the Board's decision of 16 February 2011. It follows that there must be a concern that the Trust simply decided to advantage one of its own members and disadvantage its staff member. Even if that is not true, it certainly seems as if the Trust has taken no proper steps to protect itself from that allegation. For instance, in the minutes of the meeting at which the decision to dismiss Ms Horne for redundancy was made and the consequential decision to engage Ms Fox's firm to replace Ms Horne, there is no evidence from the minutes that Ms Fox declared her interest in the subject matter and withdrew. Indeed, the minutes imply that Ms Fox was involved in the meeting throughout.

[33] At the time that the decision was taken (March 2011), Ms Fox had a small accounting practice and she told the Authority that she had one staff member at that time plus herself. But she also told the Authority that the significant aspects of the job previously performed by Ms Horne (such as the preparation for the audit), would only be able to be done by her. It follows that, in the Authority's opinion, although Ms Fox is a contractor, she is hardly an independent contractor in the true sense of that expression. In fact, until the meeting at which she was appointed to fill the role, she was still a member of the Trust and effectively, for all practical purposes, she was a sole trader. What would happen if she became ill? What would happen if she needed to take holiday leave? The Trust response to these questions is to say that Ms Fox would simply have to get somebody else to stand in for her, but arguably that is what Ms Horne did when she became ill, but for whatever reason the arrangements that she made with Ms Fox did not produce the result that Ms Horne desired. In any event, the Authority is not persuaded that a restructure effected to remove a single employee and replace her with a single contractor (effectively) who was herself at the relevant time a member of the governing trust, meets the test which the Trust itself set of obviating a concern around absences creating performance defaults. Furthermore, the semblance of impropriety, both in terms of the Trust's action in appointing

Ms Fox while she was a member of the Board, and of Ms Fox in participating apparently in that decision so as to advantage her business, suggests a lack of genuineness and a lack of good faith.

Was the process fair?

[34] The Authority is not satisfied that the process followed by the Trust was the process that a fair and reasonable employer would adopt. First, the Authority has already noted that at the very time that the Trust was deliberating on the future of Ms Horne's position in its Board meeting of 16 February 2011, Ms Horne was indicating to Ms Plunkett, her manager, that she was about to return to duty. Second, the Trust's approach to Ms Horne on 1 March 2011 was misconceived. Mr Quigan was given the task of going to see Ms Horne by himself without any other representative of the Trust. Ms Horne quite properly took offence at that and suggested that some of the trustees ought to be present, given that they were her employer. The Authority agrees. Ms Horne was entitled to meet with and engage the decision-maker. It follows that the Authority is not convinced that the meeting of 4 March had any force or effect in terms of the obligation to consult. A meeting which cannot allow genuine consultation because the protagonists are not physically present is no meeting of consultation at all. That conclusion appears to be confirmed by the fact that Mr Quigan was quite straightforward in making clear that he could not answer all of Ms Horne's questions when she raised them at the 4 March meeting.

[35] When the parties convened with Mr Henson, the Chair of the Trust, at a meeting on 14 March, Ms Horne raised a number of sensible observations about what the Trust might do, principally to try to keep a role for her within the wider organisation. The approach that the Trust took to these representations was to discuss them with Ms Fox. In his report to the Board of the Trust dated 14 March 2011 (the very day that the parties had met to "consult" about the redundancy), Mr Quigan had this to say:

Since the meeting I have spoken with Moira Fox who has confirmed that all of the key responsibilities of Selena (Ms Horne's) current role as organisational services manager should be out sourced to an external provider and that only a small number of tasks should remain internally with the Trust and that these would be performed by the receptionist (data entry, some basic payroll actions and some client liaison) and the manager.

When asked about whether Selena [Ms Horne] would have a role to play in any discussions with the preferred provider or any handover process, she commented that from her perspective there would not be any need for either of these events to occur ...

[36] Effectively what the Trust did then is to take Ms Horne's suggestions about alternatives to its proposal and to discuss those suggestions with the Board member who was effectively competing with Ms Horne for her position. The Authority makes that observation because, of course, by the time that Mr Quigan spoke with Ms Fox on 14 March 2011, she had had her proposal into the Trust to replace Ms Horne as a contractor for some two weeks, according to her evidence to the Authority.

[37] Plainly, it was completely inappropriate of the Trust to allow Ms Fox to be in any way involved in the decision to dismiss Ms Horne for redundancy and to consult her about what Ms Horne said in the consultation phase of the redundancy process simply points up the unsatisfactory nature of the Trust's process.

[38] The Authority has no hesitation in concluding that, applying *Simpsons Farms Ltd v. Aberhart* [2006] ERNZ 825, the consultation provided in the present case was unsatisfactory and did not meet the requirements of the law. In that case, the Chief Judge had this to say:

Consultation requires more than a mere prior notification and must be allowed sufficient time. It is to be a reality, not a charade. Consultation is never to be treated perfunctorily or as a mere formality. If consultation must precede change, a proposal must not be acted on until after consultation. Employees must know what is proposed before they can be expected to give their views. Sufficient precise information must be given to enable the employees to state a view, together with a reasonable opportunity to do so. This may include an opportunity to state views in writing or orally. Genuine efforts must be made to accommodate the views of employees. It follows from consultation there should be a tendency to at least seek consensus. Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done.

[39] The Authority is satisfied that, in a number of significant regards, the Trust has failed in its obligations. Given the timeframe in which this decision was implemented, the fact that the first meeting in the Authority's view was no meeting at all because the Trust was not properly represented, it is difficult not to accuse the Trust of simply going through the motions. Looking at the evidence and standing back to reflect upon it, it seems that the Trust made a decision on 16 February to remove Ms Horne from the management team, that it met with her on 14 March, got

her responses then, promptly discussed them with the person who two days later it would contract with to take over her role and then, without showing any tendency to “*seek consensus*” or any evidence of having listened to Ms Horne at all, it simply did precisely what it was proposing to do in the first place, and dismissed Ms Horne for redundancy.

[40] The Authority is also obligated to consider the most recent decision of the Full Court in relation to redundancy matters, *Massey University v. Wrigley & Ors* [2011] NZEmpC 37. In that decision, the Full Court had this to say about the realities of a restructuring:

Recognition of the inequality of power in employment relationships is also directly relevant. When a business is restructured, the employer will, in most cases, have almost total power over the outcome. To the extent that affected employees may influence the employer’s final decision, they can do so only if they have knowledge and understanding of the relevant issues and a real opportunity to express their thoughts about those issues. In this sense, knowledge is the key to giving employees some measure of power to reduce the otherwise overwhelming inequality of power in favour of the employer.

[41] Applying those precepts to the present case, it is difficult to see how the Trust had complied with its legal obligations. It had given scant regard to Ms Horne’s submissions. They had given her very little time to consider the matter. Nor had it given itself much time to consider her responses and to reflect on them. It has simply exercised its power and control over Ms Horne to her obvious disadvantage. What is more, that decision of the Full Court in *Wrigley* goes on to make clear that an employer’s obligations now in a restructure are to provide the range of information that will enable the employee to adequately participate in the decision making process. Here, the decision was simply presented as a *fait accompli* and there was no evidence whatever that the Trust took any notice of what Ms Horne said save for consulting with the person who was going to replace her as a contractor, to see what she thought.

Determination

[42] The Authority is satisfied that Ms Horne has made out her claim to have been unjustifiably dismissed. The Authority’s conclusions are that the redundancy was not a genuine one and, in any event, that the process used by the Trust was neither fair nor just, being both too hasty and failing absolutely the obligations in respect of consultation. Furthermore, the Trust, in failing to address the deficits it identified in

the performance of Ms Horne's role while she was on sick leave, exacerbated the problem that she faced on her return to duty and actively contributed to making her unwell again.

[43] Because Ms Horne has been successful, she is entitled a consideration of remedies. However, the Authority is obligated to reflect on whether she has contributed in any way to the circumstances giving rise to her personal grievance. There is no evidence before the Authority to suggest that she has: s.124 of the Act applied.

[44] In reflecting on the compensation that ought to be paid, the Authority has taken account of its conclusion that the Trust has contributed to Ms Horne's subsequent ill health (the diagnosis for depression and anxiety) by not promptly addressing the deficits in the performance of her role while she was away on sick leave for cancer treatment earlier. Other considerations, of course, revolve strictly around the unjustified dismissal.

[45] For the avoidance of doubt, the Authority relies on s.122 of the Act to conclude that Ms Horne in fact has an earlier grievance for disadvantage as a consequence of suffering unjustified actions from the employer in that the employer's failure to address the deficits in the performance of Ms Horne's role while she was on sick leave for cancer treatment created the subsequent disadvantage for Ms Horne by materially encouraging the Trust to purport to disestablish her position.

[46] Lost remuneration is sought for the period from April 2011 down to November 2011 but set off by part time earnings on the one hand and a clearance to work only part hours on the other. The law requires the Authority to consider reimbursing the employee for a sum equal to the whole or any part of the wages lost as a result of the grievance and in terms of s.128 of the Act, the Authority is required to direct that the employer is to pay the lesser of the sum lost or three months' ordinary time remuneration. In the present circumstances, the Authority thinks it appropriate to direct that the Trust pay to Ms Horne a sum equal to 50% of her total remuneration from April 2011 down to February 2012, exercising the Authority's powers to award a greater sum than the minimum to which Ms Horne would otherwise be entitled pursuant to s.128(2) of the Act.

[47] Ms Horne also seeks legal costs and these will be referred to in the next section of this determination.

[48] To remedy Ms Horne's personal grievances, the Authority directs that:

- (a) The Trust is to pay to Ms Horne the sum of \$8,000 as compensation under s.123(1)(c)(i) of the Employment Relations Act 2000; and
- (b) The Trust is to pay to Ms Horne the sum of \$25,000 gross as a contribution to lost wages incurred by Ms Horne in her unjustified dismissal; and
- (c) The Trust is to pay the filing fee of \$71.56.

Costs

[49] Costs are reserved. The parties are to seek to agree costs between themselves. Failing that, leave is reserved for either party to make application to the Authority for costs to be fixed. Both parties will be expected to make written submissions in that regard.

James Crichton
Member of the Employment Relations Authority