

**This determination
contains an order
prohibiting publication of
certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 234
3039873

BETWEEN SERENA IRVING
Applicant

AND WILLIAM BUCK (NZ)
LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Shelly Eden for Applicant
Mark Donovan for Respondent

Investigation Meeting: 27 February 2019

Date of Determination: 18 April 2019

DETERMINATION OF THE AUTHORITY

- A. Ms Irving's dismissal was justified.**

- B. William Buck (NZ) Ltd did not breach its duty of good faith.**

- C. Costs are reserved.**

Non publication orders

[1] Non publication orders apply to the names of clients and the financial information contained in the evidence given by Mr Darren Wright, a director of William Buck (NZ) Ltd.

Employment relationship problem

[2] Ms Irving started working for Christmas Gouwland Limited (a chartered accounting firm) as a Manger in 2007. She progressed to the position of Associate Director with responsibility for five accountants.

[3] In September 2012 Christmas Gouwland merged with William Buck (NZ) Limited (WBL). Ms Irving signed a new employment agreement on 3 September 2012 with WBL which recognised her previous service.

[4] WBL has three divisions: Business Advisory, Audit and Tax Services. Each division is headed by two or more directors – the majority of whom are also owners of the business.

[5] Each director has a fee base and a team that services their clients. A team reports directly to their director and operates as a standalone business unit. From 2012 Mr Gouwland was one of three Business Advisory Directors and one of six Equity Directors.

[6] Ms Irving worked in a Business Advisory team reporting to Mr Gouwland, working with his client base. She was the most senior member of Mr Gouwland's team and was involved in resource planning, revenue generation and billing processes and until she commenced parental leave, was familiar with the teams' productivity and efficiency targets and actual results.

[7] Ms Irving commenced a period of parental leave on 5 December 2016 and was due to return to her position on 4 September 2017.

[8] In April 2017, Mr Gouwland advised his equity partners that he was looking to leave the firm and take his client base with him. No firm arrangements were in place at that time.

[9] In early August 2017 Ms Irving contacted WBL to signal she was ready to resume work, as planned. Mr Gouwland left the business on 31 October 2017. As a result of Mr Gouwland's departure Ms Irving's position was disestablished and she

was made redundant. Ms Irving challenges her dismissal claiming it was unjustified. Ms Irving also claims that WBL has breached its statutory obligations of good faith.

[10] WBL denies the claims.

Issues

[11] In order to resolve Ms Irving's employment relationship problems I must determine the following issues:

- a) Was the dismissal by reason of redundancy justified and if not, what if any remedies should be awarded?
- b) Did WBL breach its statutory obligations of good faith and if so what if any penalty should be imposed?

[12] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. It has not recorded all evidence and submissions received.

Mr Gouwland's departure

[13] In April 2017 while Ms Irving was on parental leave Mr Gouwland advised the equity directors of WBL that he planned to resign and move to another firm. At that time he did not have a finalised agreement but was negotiating with several firms. Mr Gouwland advised that when he left the firm he intended to take his clients. He requested and was granted permission to offer employment at his new firm to members of his team if roles were available for them.

[14] In August Mr Gouwland confirmed to WBL he was finalising an agreement with his chosen firm and would be able to offer roles to his junior team members but there were no senior roles available for Ms Irving. Mr Gouwland indicated he would be leaving in September or October.

[15] Concurrently with his notification to the firm, Ms Irving contacted Mr Gouwland and advised him she was intending to return to work in accordance with their agreement, on 4 September.

[16] On 14 August Ms Irving was contacted by Ms Kim Daji, General Manager who advised her that Mr Gouwland was leaving the firm and taking his client base with him. She advised Ms Irving the impact of that meant disestablishment of her role was a possibility. Ms Irving was invited to attend a meeting to discuss the implications of Mr Gouwland's decision on 17 August and to bring a support person with her.

[17] Mr Gouwland led the meeting on 17 August and spoke from prepared notes which have been made available to the Authority. The notes were arranged in three sections:

- a) Outlining the current situation – this covered Mr Gouwland's decision to leave the firm before the end of the year probably in October or November. That there did not appear to be a role for an Associate and that he intended to take his clients with him. Mr Gouwland advised Ms Irving the group of Directors' of WBL had considered whether they needed an Associate across their business advisory division and other teams but they did not. Because of these circumstances it was proposed to disestablish Ms Irving's role as an Associate in Mr Gouwland's team when he left the firm.
- b) Things to consider and discuss – this included the consideration of other suitable positions which would be continually assessed plus other alternatives Ms Irving may have for consideration.
- c) Next steps – this covered contact with EAP support if Ms Irving needed it and a further meeting to answer questions and for Ms Irving to provide feedback on the proposal. Mr Gouwland advised Ms Irving that following the next meeting they would consider her thoughts and have further discussions as needed before a decision was made about the proposal.

[18] Ms Irving indicated that if her role was disestablished she would likely set up in business on her own account. She requested permission to take three clients with her including her sister-in-law.

[19] Later that day Ms Irving emailed Ms Daji and Mr Gouwland thanking them for the conversation. Ms Irving asked for clarification as to whether she needed to wait until the end of a notice period to commence new employment if she found employment or a contract accounting role and if she started her own practice if she could offer her services to the public before the end of the notice period.

[20] Mr Gouwland wrote to Ms Irving the following day confirming:

- a) The notification made to Ms Irving the previous day that he was in negotiations to join another firm, that he intended to take his clients with him to the new firm and that this would be a significant change for the firm and the business services division.
- b) If the proposal was implemented the role of Associate in Mr Gouwland's team would no longer be required and would be disestablished.
- c) That the change would affect all of the roles within his team and that he was consulting with everyone about the changes and how they might be impacted.
- d) That the firm had considered whether it required an Associate position across its business advisory division or other teams and had concluded it did not.

[21] Mr Gouwland responded to Ms Irving's question about making arrangements for three specific clients. WBL agreed Ms Irving could contact two of the named clients for the purpose of asking whether they would prefer her to undertake services for them. He told Ms Irving that if the clients decided to have her undertake services for them the clients would remain on WBL's agency listing for a period of up to four months to allow Ms Irving time to set herself up.

[22] In response Ms Irving reiterated her advice during the 17 August meeting that she expected to be offered an Associate role if one became available during the 26 week period of preference under s 36(1)(d)(ii) of the Parental Leave and Employment Protection Act 1987.

[23] On 21 August Ms Irving emailed Ms Daji to explain that she had spoken to the two WBL clients who had advised her they wanted to remain her clients due to personal contact and they would be transferring their business to Ms Irving when she had found a suitable position.

[24] On 23 August Ms Daji telephoned Ms Irving and advised that WBL was happy to meet with her in person to obtain her feedback on the proposal. Ms Irving advised Ms Daji that she had no further questions or feedback on the proposal.

[25] Ms Daji advised Ms Irving that if the proposal proceeded she would not be required to return to work at the conclusion of her parental leave but would continue to be paid until a firm date for Mr Gouwland's departure was known.

[26] Ms Daji raised the possibility of giving Ms Irving greater certainty by agreeing an end date with her if the proposal was confirmed. Ms Irving indicated that she was unlikely to agree to this but invited Ms Daji to put her suggestion in writing for her to consider so that she could formally respond.

[27] Later that day WBL's director Mr Darren Wright wrote to Ms Irving confirming that her role of Associate would be disestablished. Mr Wright was unable to give Ms Irving an effective date although he advised Ms Irving that Mr Gouwland had indicated a possible end date of 29 September. He acknowledged the 26 week period of preference at the end of Ms Irving's parental leave. Mr Wright advised Ms Irving that it was not likely there were or would be any other suitable or similar positions available in the foreseeable future but would contact her if that changed.

[28] Mr Wright advised Ms Irving that under the circumstances she was not required to come into the office after her parental leave concluded in the hope that Ms Irving could concentrate on finding a new role or setting up her own business.

[29] Consistently with Ms Daji and Ms Irving's discussion earlier that day Mr Wright proposed they agree on a termination date of 29 September to bring certainty to the process. There is no record of Ms Irving responding to this proposal and from

the continuing discussion that occurred after 23 August it is apparent that she did not accept the proposed termination date of 29 September.

[30] On 12 September Ms Irving emailed Ms Daji and asked if she would be considered for a BAS Director role if one came up during the 26 week period of preference. In response Ms Daji advised that a Director role would be fundamentally different to her Associate role and would therefore not apply during the 26 week period of preference.

[31] Ms Irving visited WBL's office on 27 September with Mr Rupesh Parikh. Ms Irving introduced Mr Parikh to those she met, as her new business partner and advised staff she had decided to go into practice for herself.

[32] On 29 September Ms Irving was advised that Mr Gouwland had become unwell and his date of departure continued to be uncertain.

[33] On 12 October Ms Daji rang Ms Irving advising that Mr Gouwland had confirmed he was leaving WBL on 31 October. WBL emailed Ms Irving later that day with a letter confirming that her last day of employment would be 9 November.

[34] Subsequently there was further correspondence with Ms Irving about the communication that would be made to other WBL staff regarding her departure. Ms Irving agreed with the wording to be contained in a notice to the staff which included a statement that she had embraced the change and had decided to go into practice for herself.

Was the dismissal justified?

[35] The employment agreement between the parties deals with redundancy in the following terms:

You recognise that the firm has a right to manage its business and has an absolute discretion to determine appropriate staffing levels.

In the event that your position is declared redundant, you shall be given four (4) weeks notice of termination of your employment or at the discretion of the employer, be paid in lieu thereof. The notice period specified in this clause shall be inclusive of the notice period specified in the termination clause above.

You will not have any entitlement to redundancy compensation.

[36] In order for a redundancy to be justified WBL must demonstrate the dismissal was what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. I must consider whether WBL met the minimum standards of procedural fairness outlined in s 103A of the Act and whether it made a decision to terminate the employment relationship on substantively justified grounds.

[37] The Court of Appeal considered the application of section 103A in a redundancy setting in *Grace Team Accounting Limited v Brake*.¹ That decision upheld the earlier Employment Court decision where the Court confirmed employers must show that a decision to make an employee redundant is genuine and based on business requirements.²

[38] An employer is entitled to have a working plan in mind for its business when it puts a proposal to an employee for consultation but this must be more than just a gut feeling.³

[39] Section 4 of the Act requires parties to an employment relationship to deal with each other in good faith when restructuring. Parties are to be active and constructive in establishing and maintaining a productive employment relationship in which they are responsive and communicative.

[40] The statutory obligations of good faith require employers to provide affected employees with access to information relevant to the continuation of the employee's employment and an opportunity to comment on the information before the decision is made.

[41] That Ms Irving was on parental leave at the time the events leading to the ending of the employment relationship occurred adds a level of complexity to the determination of her claim.

Parental Leave and Employment Protection Act 1987

¹ [2014] NZCA 541.

² [2013] NZEmpC 81.

³ *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71.

[42] Part 5 of the Parental Leave and Employment Protection Act 1987 (PLEPA) deals with rights and obligations after the commencement of parental leave.

[43] Sections 40 and 41 of the PLEPA stipulate a presumption that an employee's position can be kept open while the employee is on parental leave. Section 51 of the PLEPA provides a special defence relating to dismissal during parental leave. This special defence is only available in limited circumstances including a redundancy situation.

[44] Section 51 of the PLEPA requires the employer to be satisfied there is no prospect of the employee being appointed to a position which was vacant and which was substantially similar to the position held by the employee at the beginning of the employee's parental leave.

[45] Ms Irving says there were vacancies in the firm due to four employees being promoted soon after her redundancy. The promotions were of a Manager to Associate and three Associate's to salaried director. Ms Irving says she should have been considered for the Associate role and/or any of the three vacancies arising from the promotions to Salaried Director.

[46] I have accepted the evidence from WBL that promotions within the firm did not leave vacancies which could be filled. This is because promotions were personal to the individual and done in recognition of their contribution to the firm and as part of their own personal development.

[47] Employees were not promoted from one role to another leaving a vacant or empty role to be filled. By way of example Ms Irving, as the most senior member of Mr Gouwland's team, was promoted from Manager to Associate prior to the change to WBL. When that promotion was confirmed the position of Manager did not become a vacancy to be filled. Rather Ms Irving continued to work with the same client base, undertaking the same work but with some additional responsibilities. That is the same situation applying to the four promotions which took effect from January 2018.

[48] I am satisfied that following the disestablishment of her role in the BAS team directed by Mr Gouwland there were no vacant positions available for Ms Irving and no vacancies arose as a result of the promotions in January 2018.

Was the redundancy for genuine business reasons?

[49] The work of the firm was divided into teams. Each team was headed by an Equity Director who was responsible for all of the team members including Managers, Associate Directors, or Salaried Directors.

[50] The loss of Mr Gouwland's portfolio of clients was a significant loss to WBL of which Ms Irving would have been aware given the majority of her work before she commenced parental leave (between 85 and 96%) was for those clients.

[51] Ms Irving was not the only employee affected by the loss of Mr Gouwland's portfolio of clients. All other members of the team were also directly affected including a new graduate. Apart from Ms Irving and the graduate the other team members were offered employment with Mr Gouwland's new firm. Mr Gouwland's uncontested evidence was that he enquired several times with his new firm about the possibility of employment for Ms Irving without success.

[52] I find the reason for Ms Irving's redundancy was because of the loss of Mr Gouwland and his portfolio of clients which had a significant impact on WBL's business. The decision to disestablish Ms Irving's role was for genuine business reasons.

Procedure

[53] Ms Irving claims she was not able to provide any feedback on the proposal to disestablish her role because she did not receive enough information during the consultation process in order for her to properly raise any options or alternatives to being made redundant.

[54] As noted by the Court in *Lewis v Greene*, the PLEPA creates an assumption that the employee's interests will be paramount in circumstances where an employer is contemplating her return to work following parental leave. An employer's

obligation to actively consult increases because the fact that the employee is on parental leave increases her vulnerability.⁴

[55] Consultation must be meaningful and must include an employee on parental leave being given full information about the workplace and a realistic opportunity to comment on any proposal in light of that information.⁵

[56] Ms Irving told me she was not given the opportunity to discuss or consider the implications the promotions would have on her ability to remain within the firm. As already noted earlier in this determination the promotions did not create any vacancies within the firm and would have had no impact on whether Ms Irving could remain within the firm.

[57] Ms Irving was critical of WBL for focussing on losing Mr Gouwland's client base and revenue of \$1.2 million. Ms Irving did discuss with Mr Gouwland that she had unsuccessfully attempted to purchase a suitable fee base while she had been on parental leave but nothing had been available. This evidence shows there was discussion about the loss of the revenue resulting from Mr Gouwland's departure.

[58] Ms Irving told me she could have worked across the firm as she had previously done but this was not an option discussed with her. It was common ground that in addition to undertaking the work for Mr Gouwland's clients Ms Irving undertook other, often unchargeable work, across the firm including establishing systems and processes for use within the firm. Ms Irving told me she also assisted other teams when necessary undertaking some chargeable work. In total she told me the additional work amounted to about 15% of her workload. Ms Irving did not raise this as an alternative during the consultation process. She advised Ms Daji that she did not wish to meet in a second meeting to provide feedback.

[59] WBL needed to fully assess whether there was any ongoing work for Ms Irving following Mr Gouwland's departure. I am satisfied this was done. After inviting Ms Irving to the first meeting Ms Daji met with Mr Wright where they discussed whether Ms Irving could be retained within the business but concluded that

⁴ *Lewis v Greene* [2004] 2 ERNZ 55 at [119].

⁵ *Ibid* at [121].

there were no unallocated clients or team members to manage and all clients were already fully served by other employees in the teams reporting to the two remaining Directors in the BAS division. They also considered whether there were any significant projects known or anticipated and that could not be catered for by the existing roles in the firm but concluded there were none. This information was disclosed to Ms Irving at the meeting on 17 August.

Conclusion

[60] Ms Irving told Ms Daji she had accepted the reasoning for the restructuring and immediately took steps to establish her own business. I am satisfied WBL made a genuine decision based on business requirements to disestablish Ms Irving's role because it had become surplus to its requirements. The decision to terminate Ms Irving's employment by reason of redundancy was a decision an employer acting fairly and reasonably could make. Ms Irving was not unjustifiably dismissed.

Breach of good faith and Penalties

[61] Ms Irving has not established to my satisfaction any breach of good faith by WBL. Accordingly her application for the imposition of penalties is declined.

Costs

[62] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so WBL shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Ms Irving shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[63] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority