

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 66/08  
5076461

BETWEEN                    CATHY JOHNSON  
                                         Applicant  
  
AND                            GILLIGAN BUSINESS  
                                         SCHOOL LIMITED  
                                         Respondent

Member of Authority:      Alastair Dumbleton  
  
Representatives:            Applicant in person  
                                         Rachel Larmer, counsel for Respondent  
  
Investigation Meeting:      17 August 2007  
  
Submissions received:      17 August and 7 September 2007  
  
Determination:              28 February 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

- [1]     The Authority has investigated the dismissal of Ms Cathy Johnson.
- [2]     On 13 September 2006 a director of Gilligan Business School Limited (“GBS”), Mr Allan Gilligan, wrote to Ms Johnson to advise that the company was ending her employment.    The reason given for this action was redundancy.
- [3]     Ms Johnson immediately raised a personal grievance.    In a letter to Mr Gilligan dated 15 September 2006 she set out her disagreement with the employer’s actions, making the following points:
- (a)     No prior discussion before being asked to consider and comment upon the proposal to disestablish her position – indicating pre-determination.
  - (b)     No consideration given to alternatives to redundancy, such as reducing her hours of work.

- (c) The recent employment of a new staff member being unnecessary and further adding to the cost of running the business.
- (d) Failure to follow a fair and reasonable process, in particular by failing to give notice of the redundancy situation and by failing to consult about it.
- (e) Absence of a genuine reason for the redundancy; dismissal being avoidable, and revenue being available to fund her salary.

[4] As Ms Johnson's grievance remained unsettled after mediation, the Authority commenced investigating the claim to enable it to be resolved with this determination.

[5] There is no dispute that Ms Johnson's employment ended by GBS dismissing her. The focus of the investigation by the Authority has therefore been the justification for that action taken by the employer.

[6] Section 103A of the Employment Relations Act 2000 provides the test of justification the Authority is to apply. The provision requires that justification must be determined on an objective basis or, as the Employment Court has explained this aspect of the test, the dismissal must be looked at;

*..... from the point of view of a neutral observer.*

See, *Air New Zealand Limited v Hudson* [2006] 3 NZELR 155, at paragraph 113.

[7] In a decision further explaining the operation of s 103A, the Court in *Simpson Farms Limited v Aberhart* [2006] ERNZ 825, concluded that redundancy case law from the Court of Appeal including the leading judgment given in the *Hale* case, has continued to be good authority since the passage of the Employment Relations Act and its amendments such as s 103A.

[8] Relevant to this case is a frequently quoted statement by the Court of Appeal from its *Hale* decision – [1990] 2 NZILR 1079, at page 1084 – which begins as follows;

*..... this Court must now make it clear that an employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, re-organisation or other cost-saving steps, no matter whether or not the business would otherwise go to the wall.*

[9] The Court, at page 1086 of its judgment, also stated;

*If for genuine reasons the employer concludes that a worker is surplus to its needs, it is not for the courts or the unions or workers to substitute their business judgement for the employer's.*

[10] Therefore any consideration given by the Authority to the cost-saving steps Mr Gilligan claimed were the reason for Ms Johnson's termination, may only go so far as is needed to satisfy the Authority that Mr Gilligan (on behalf of GDS) exercised his business judgement or commercial acumen, and did not act out of ulterior motives. How Ms Johnson or the Authority might have responded to the trading conditions experienced by GDS in 2006 and the company's financial performance that year, is not to become a determinant in this case.

[11] The Authority when investigating claims such as this one brought in the context of a redundancy situation, must also satisfy itself that the employer complied with the statutory obligations of good faith dealing under s 4 of the Act. They include the obligation to consult affected employees about any proposed redundancy.

[12] GBS was a small business owned and run by Mr Gilligan and his wife. Mrs Gilligan was an employee, and another person was employed part-time for tutoring and accounting work. The only other employee was Ms Johnson.

[13] When Ms Johnson's employment was ended by Mr Gilligan she had been employed for nearly eight months in the role of Sales and Marketing Manager. This was a full time position at a salary of \$60,000 plus commission payments up to \$15,000 per annum if an increase in sales was achieved.

[14] Ms Johnson did not suggest that Mr Gilligan had any ulterior motives arising from her conduct or performance for terminating her employment. In her evidence she accepted that the dismissal was no reflection on her performance.

[15] I find from the evidence that the sole objective of Mr Gilligan in terminating the employment of Ms Johnson was to save cost for GBS. Dissatisfaction with Ms Johnson's conduct or performance for any reason, was not the motivation for the employers action.

[16] Although Ms Johnson said she did not accept that the decision was a commercial one, what she really meant by this statement was that her ideas for cost saving were preferable to those of Mr Gilligan. As stated above, it is not open to the

Authority to approach the case in that way. There were several options for trying to save cost, but the decision was the employers to make as to which of those was best.

[17] It may well be that an obviously rash or patently foolish decision, especially when made by a company director such as Mr Gilligan who is also a professional accountant of long experience, will be questionable as to the genuine intent behind it and whether its purpose is simply to hide another reason for the dismissal.

[18] In this case however Mr Gilligan's decision does not stand out as inexplicable but seems an understandable one made on the basis that new business was declining despite the efforts of Ms Johnson, who had been employed to increase sales and revenue.

[19] It is material to the Authority's investigation for it to consider whether Ms Johnson was informed of the possibility of redundancy in her position and was given an adequate opportunity to put forward her ideas to Mr Gilligan for him to consider before finally making any decision.

[20] I find that Ms Johnson was properly and adequately consulted. The idea she put forward of reducing her days of work to three a week was listened to by Mr Gilligan but ultimately rejected. Mr Gilligan's wife who was a GBS employee had since July been going without pay for her work. This was one measure already taken to save cost, and the arrangement was extended after Ms Johnson was dismissed. Mr Gilligan was not an employee and was not paid any directors fees, so there was no excess spending that could be trimmed from that quarter.

[21] I find that within the relatively small operating budget of GBS significant strain was placed on the financial situation by the additional position created when Ms Johnson was employed. Her salary added \$60,000 or more to operating costs and needed to be paid for by increased revenue from sales. However sales were steadily declining and although the sale price was raised this simply left revenue static rather than on the increase. For this reason profits decreased substantially and to address that situation GBS decided to disestablish Ms Johnson's position.

[22] The procedure used by GBS in deciding to terminate Ms Johnson's employment and in implementing the redundancy, came under close scrutiny during the Authority's investigation.

[23] I find that GBS did approach the situation in the way that a fair and reasonable employer could be expected to act in the circumstances.

[24] To begin with Mr Gilligan raised with Ms Johnson the prospect of GBS making a decision about the future of her employment. He followed up his personal discussion with a letter dated 8 September 2006, in which he made clear the possible serious implications to Ms Johnson if changes to her position were decided upon as a way of saving cost for the business. Mr Gilligan advised Ms Johnson in his letter that no decision would finally be made until she had had a reasonable opportunity to take advice and comment on the situation. For this purpose he gave her four days until 13 September to think about the situation, and he offered her time off on pay if she needed it.

[25] Mr Gilligan met with Ms Johnson at her request on 12 September for further discussion and to hear what she had to say. Ms Johnson proposed that her weekly days of employment could be reduced from five to three. Mr Gilligan and his wife discussed that suggestion but they were not satisfied it would address the problem sufficiently.

[26] On 13 September 2006, Mr Gilligan wrote to Ms Johnson advising that after careful review and consideration of her responses it had been decided to disestablish her position of employment. He confirmed that she would receive her contractual entitlement to three weeks notice or pay in lieu thereof, and all other payments due.

[27] A further challenge made to the justification for the dismissal was that it was carried out in breach of the duty of good faith imposed on employers by s 4(1A) of the Employment Relations Act 2000. It was claimed that GBS had not supplied to Ms Johnson information it had which was relied upon in making the decision. In this regard Mr Gilligan conceded that he had not shown Ms Johnson the profit and loss statements for the business.

[28] The Authority is quite satisfied that although primary accounting records may not have been offered to her for inspection, Ms Johnson had earlier been made aware in sufficient detail of GBS's declining financial performance and that nothing of substance had been withheld from her. There had been weekly meetings between Mr Gilligan and Ms Johnson looking at sales, and previously from time to time there had been discussion between them about the decline in sales and the increases in

costs. During those discussions a proposal to reduce her days of work to three was made by Ms Johnson, before the possibility of redundancy had been raised with her by Mr Gilligan.

[29] I find there was no obligation for Mr Gilligan to give prior notice to Ms Johnson before first raising with her the possibility of redundancy. Neither was it a requirement for Ms Johnson to have a representative present then. He did not request an immediate response from Ms Johnson on 8 September but expressly gave her an opportunity to take advice and consider whether she had any better ideas. She was not prevented from having a representative if she had wanted one on 12 September when further discussion took place.

[30] At the investigation meeting a letter dated 10 September 2006 from Ms Johnson to Mr Gilligan was produced. Mr Gilligan claimed he had never seen it before. There was a second letter or memorandum, which was undated but addressed to Mr Gilligan and his wife. Ms Johnson claimed that this had also been given by her to Mr Gilligan just prior to her termination. Mr Gilligan said he had not received it.

[31] As well as Mr Gilligan denying that GBS had ever received either of the documents, Ms Larmer advised that they had not been provided to her as counsel, during the formal process of disclosure undertaken voluntarily between the parties prior to the Authority's investigation.

[32] The letter dated 10 September 2006 contained a proposal by Ms Johnson that her redundancy be delayed until the end of March 2007. The rationale she gave in the letter for this was as follows:

*It is my firm belief that, should the business continue to function in the manner that was applied between February 2006 and July 2006 (a wining formula) Gilligan Business School will continue with its 20% growth.*

*From 01 October 2006 to 31 March 2007 the figures will be achieved based on the February intake of the "Accounts Assistant" course and the initiation of a "Summer School" project. The in-office enrolments are boosted by a minimum of 30% with me working enrolments.*

[33] The second document although undated appears to have been written prior to 8 September 2006 when Mr Gilligan had for the first time raised the possibility of redundancy with Ms Johnson. Reference is made in it to a meeting held on 17 August

2006. Ms Johnson's concern arising from that particular meeting was that she had been asked not to undertake administration work and not to deal with the New Zealand Qualifications Authority, but instead concentrate on her sales and marketing role. In this regard she had been asked to go out on the road selling, in a planned way, rather than spending too much time in the office. I note that Ms Johnson in her undated memorandum acknowledged that she had been employed as Marketing Manager, although she differed with Mr Gilligan as to the most effective way to perform her sales and marketing role.

[34] I find it more likely than not that the two documents written by Ms Johnson and addressed to Mr Gilligan were not sent to him or were not received by him. His evidence that he had not seen them before the investigation meeting is supported by the lack of any reference to either of the two documents in the statement of problem in which correspondence entered into was listed. The items are dated between 17 August and 27 September.

[35] Before the statement of problem was prepared by Ms Johnson's counsel, an experienced employment lawyer, she had written a letter dated 15 September to Mr Gilligan. She drew attention in it to earlier communications, but made no mention of her proposal in writing for the redundancy to be delayed until the end of March 2007. If she had communicated that proposal to Mr Gilligan and he had failed to respond, it seems to me likely that Ms Johnson would have complained about that failure in the letter of 15 September.

[36] It was also claimed that the letter dated 10 September 2006 and the undated memorandum had been disclosed to Ms Larmer's law firm along with all other information held by Ms Johnson relevant to the case. I consider it unlikely that the two documents would have been misplaced or overlooked by Ms Larmer or her firm, if they had been received along with others in the process of disclosure.

[37] I must therefore find that the two documents produced by Ms Johnson at the investigation meeting can have no bearing on the outcome of this case, as they were not before Mr Gilligan when he made his decision.

[38] In conclusion, applying the test of justification provided by s 103A of the Act, the Authority determines that the actions of GBS and how GBS acted were what a fair and reasonable employer would have done in all the circumstances at the time the

dismissal of Ms Johnson occurred. This is how the “neutral observer” as depicted by the Employment Court, would have viewed the situation.

[39] I find that the dismissal of Ms Johnson was compelled only by genuine commercial reasons. A redundancy situation was present and therefore the employer had grounds to terminate the employment of an affected employee such as Ms Johnson. Further, the termination was decided upon and implemented in a fair and reasonable manner in the circumstances, particularly bearing in mind the relatively limited scale of the employers business and resources.

[40] Ms Johnson does not have a sustainable personal grievance of any kind and no orders are therefore required to be made by the Authority against GBS.

[41] Any question of costs arising is left for the parties to try and resolve by discussion. After that if necessary, application can be made in writing to the Authority for costs to be fixed and the usual right of reply will be given.

A Dumbleton  
Member of the Employment Relations Authority