

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 305/08
5101568

BETWEEN ROSANA KINZETT
 Applicant

AND THE VAULT AXS (MT)
 LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Rosana Kinzett in Person
 Pauline Sherson for Respondent

Investigation Meeting 5 August 2008 at Tauranga

Determination: 25 August 2008

DETERMINATION OF THE AUTHORITY

[1] Ms Rosana Kinzett was employed as a Sales Assistant by The Vault Axs (Mt) Limited (“VAL”) in its Mt Maunganui Store called “Rox Jewels”. Ms Kinzett was made redundant on 26 October 2007.

[2] On 2 October 2007 Ms Kinzett lodged a statement of problem in the Authority claiming payment for arrears of wages. Following her dismissal by reason of redundancy Ms Kinzett lodged a second statement of problem claiming the previously claimed for arrears of wages and also that her dismissal was unjustified. At the investigation meeting Ms Kinzett confirmed that the arrears had been paid in full and she withdrew that aspect of her claim.

[3] Ms Pauline Sherson, a director and shareholder of the Respondent denies the dismissal was unjustified. Ms Sherson was also a director and shareholder of a company called Shermart Limited, which owned two Hamilton clothing stores. On 17 October Shermart Limited was put into liquidation. Ms Sherson says that when Shermart Limited went into liquidation she decided to move back to the Mt store. She

therefore no longer required the services of one of the two employees employed there and determined to make Ms Kinzett redundant.

[4] I am required to scrutinise VAL's actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[5] The test of justification does not change the longstanding principles about justification for redundancy (see *Simpson Farms v Aberhart* [2006] 1 ERNZ 825).

[6] The Authority must be satisfied on two general points – that the business decision to make a position redundant in this case was made genuinely and not for ulterior motives; and that the respondent acted in a fair and open way in carrying out that decision – particularly, did it consult properly about the proposal to make Ms Kinzett redundant and otherwise act in a way that was not likely to mislead or deceive her, that is, in good faith?

Relevant terms of employment

[7] The relevant terms and conditions of employment were set out in a written employment agreement. The agreement provided for redundancy in the following terms:

- 12.1 The employee shall be regarded as redundant when the position held by the Employee becomes surplus to the requirements of the Employer or is otherwise disestablished as a result of the closing down of all or part of the Employer's business or a reduction in work available or as a result of any other genuine business decision of the Employer.
- 12.2 If the Employee's employment is terminated on account of redundancy, the Employee shall be entitled to two weeks notice of that termination or payment in lieu of that notice but shall not be entitled to an extended period of notice nor to compensation on account of redundancy.

Was the redundancy genuine?

[8] The Court of Appeal in *GN Hale & Son Ltd v Wellington Caretakers IUOW* [1991] 1 NZLR 151, cemented an employers right 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. A worker does not have the right to continued employment if the business could be run more efficiently without him.

[9] Further, the Employment Court in *Simpsons Farms* reiterated the right of an employer to make genuine commercial decisions relating to how its business operations will function including decisions to make positions or employees redundant.

[10] A genuine redundancy is determined in relation to the position, not the incumbent (*NZ Fasteners Stainless Ltd v Thwaites* [2000] 1 ERNZ 739).

[11] VAL operates the Rox Jewels jewellery store in Tauranga. Ms Sherson also has interests in Rox Jewels stores in Hamilton and until recently, Auckland. As already mentioned, Ms Sherson is one of the two directors and shareholders. Until September 2007 Ms Sherson was paid a salary by Shermart Ltd.

[12] Ms Kinzett says that she raised with Ms Sherson an employment relationship problem with regard to payment for days not worked due to the refurbishment of the store taking longer than expected and also with respect to time she had taken off for her honeymoon. After failing to have her problem addressed to her satisfaction, Ms Kinzett lodged an application for arrears of wages in the Authority on 2 October. Ms Kinzett claims this was the reason she was made redundant.

[13] On 5 September 2007 Ms Sherson met with her accountant and solicitor and discussed the annual accounts. Ms Sherson was advised to close the Shermart Ltd owned and operated clothing stores in Hamilton and to eliminate overheads in the other stores. On 16 October 2007 Mr Kim Thompson, a Chartered Accountant was appointed liquidator of Shermart Ltd and the company was put into liquidation the following day.

[14] With the loss of Shermart Ltd, Ms Sherson had to find an alternative source of income for herself. She decided to restructure Rox Jewels in Mt Maunganui and work in the store herself. That decision, combined with the advice of her accountant to eliminate overheads where she could, led Ms Sherson to the conclusion that she would have to reduce the number of sales assistants employed at the Mt Maungau store from two to one.

[15] I am satisfied the restructuring of VAL was for genuine commercial reasons as a direct result of Shermart Ltd being put into liquidation and Ms Sherson's need to reduce her overheads in her other stores. This falls squarely within the ambit of the employer's right to make the business more efficient as held by the Court of Appeal in *Hale*.

[16] It is most unfortunate that the timing of the restructuring occurred concurrently with Ms Kinzett's claims for unpaid wages, however, I am satisfied it is more likely than not that this was purely coincidental. As set out earlier in this determination Ms Kinzett has now withdrawn her arrears of wages claims as she has now been paid all monies due.

Was the redundancy handled in a procedurally fair manner?

[17] Section 4 of the Employment Relations Act 2000 requires VAL to deal with Ms Kinzett in good faith. This duty is to be exercised not only generally but in specific situations including redundancy.

[18] The duty of good faith set out in the Act requires an employer who is proposing to make a decision that will have an adverse affect on the continuation of employment of an employee to provide to that employee, access to information relevant to the continuation of the employee's employment, about the decision, and an opportunity to comment on the information before the decision is made.

[19] In *Communication & Energy Workers Union Inc v Telecom NZ Ltd* [1993] 2 ERNZ 429, the Court discussed the meaning of consultation in the context of redundancy and listed a series of propositions extracted from the Court of Appeal's

decision in *Wellington International Airport Ltd v Air NZ* [1993] 1 NZLR 671 (CA).

In particular, the Court noted:

- (a) Consultation requires more than mere 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.
- (b) 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.
- (c) Sufficiently 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.
- (d) Genuine efforts must be made to accommodate the views of the employees. It follows from consultation that 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.
- (e) The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change or even start anew.

[20] The integrity of a restructuring scheme, even where motivated by genuine operational requirements, may be compromised by its application to particular individuals for reasons other than that their jobs have gone. Where the selection of an employee for redundancy is "...tainted by some inappropriate motive..." and the redundancy is "...masking another and different reason...", the worker will have a valid grievance (*Savage v Unlimited Architecture Ltd* [1999] 2 ERNZ 40).

[21] Ms Kinzett says she was not aware she could be made redundant until she received a letter from Ms Sherson dated 26 October 2007 giving Ms Kinzett two weeks notice of the termination of her employment.

[22] At the investigation meeting Ms Sherson conceded that she had not been as communicative with Ms Kinzett as she could have been, but says she found the situation she was faced with particularly stressful. I empathise with Ms Sherson over having to face liquidation proceedings, however, her situation does not exclude her from her usual obligations as an employer to consult with staff over the impact the decisions Ms Sherson was faced with making, with her staff who were directly affected.

[23] Further, there were two staff members employed at the Mt Maunganui store. This left Ms Sherson in a situation where she had to select one over the other for redundancy. Ms Sherson told me she chose Ms Kinzett because she worked the

majority of the hours in the store, while the other employee only worked two or three days a week.

[24] Again, this information was not given to Ms Kinzett before the decision to dismiss was made, and therefore, Ms Kinzett did not have the opportunity to discuss any alternatives to being made redundant.

[25] An employer acting fairly and reasonably in all the circumstances of this matter, would have alerted Ms Kinzett to the need for restructuring and the possible impact on her job earlier than 26 October 2008. Further, a fair and reasonable employer would have sought Ms Kinzett's input into the decision that it should be her to be made redundant and not her colleague.

[26] The failures by Ms Sherson renders the dismissal of Ms Kinzett unjustified.

Remedies

[27] This was a genuine redundancy. Ms Sherson's businesses were obviously suffering as is evidenced by the recent closure of her Auckland Rox Jewels store. It follows that Ms Kinzett can not be compensated for the loss of her job. However she can be compensated for the failure of Ms Sherson to properly consult over the restructuring and redundancy.

[28] Taking all relevant factors into consideration I set the level of compensation at \$3,000.

The Vault Axs (Mt) Limited is ordered to pay \$3,000 to Ms Kinzett as compensation pursuant to s123(1)(c) within 28 days of the date of this determination.

Contribution

[29] The Authority is bound by section 124 of the Act to consider the extent to which the actions of Ms Kinzett contributed towards the situation that gave rise to her personal grievance, and if those actions so require, to reduce the remedies. I am satisfied Ms Kinzett has not contributed to the actions giving rise to her personal grievance. It follows that the remedies awarded to Ms Kinzett will not be reduced.

Costs

[30] Ms Kinzett is entitled to reimbursement of the Authority's filing fee of \$70.00. The Vault Axs (Mt) Limited is ordered to pay her that amount within 28 days of the date of this determination.

Vicki Campbell
Member of Employment Relations Authority