IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZ ERA Auckland 67
5361292

	BETWEEN	MARY FAY MACDONALD Applicant
	A N D	THE OPTIMUM CLOTHING COMPANY LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	John Gandy, Counsel for Applicant Paul Tremewan, Advocate for Respondent
Investigation Meeting:	5 February 2013 at Auckland
Date of Determination:	26 February 2013

DETERMINATION OF THE AUTHORITY

History

[1] This matter has already been the subject of a determination of the Authority issued on 11 May 2012 under the reference [2012] NZERA Auckland 161. While briefly traversing the factual matrix, the thrust of the 11 May 2012 determination is to deal with a contention made by the respondent (Optimum) that the personal grievance was not raised within the statutory time period.

[2] The Authority's decision in that regard was that the applicant (Ms MacDonald) had raised her personal grievance within the statutory timeframe and accordingly that the matter could proceed to hearing on the merits, unless the parties wanted to take the opportunity to use mediation as a means of trying to resolve matters by agreement.

[3] In the result, the substantive issue remained unresolved and the purpose of the present determination is to deal with the merits.

Employment relationship problem

[4] Ms MacDonald commenced employment with Optimum in August 2002 and, for most of that time, was employed in Optimum's warehouse. However, for the last seven months of her employment, she was an office worker, working in reception and with a range of other administrative responsibilities.

[5] Ms MacDonald was made redundant from her role with effect from 29 April 2011. The nature of the process which Optimum undertook will be discussed shortly, but for present purposes, it is enough to say that, at the point at which the redundancy was effected, Ms MacDonald, while not welcoming the end of her role, at least was not minded to challenge the decision.

[6] That changed when Ms MacDonald says that her *"former position"* was advertised on 3 June 2011, barely five weeks after her departure. The advertised position was part time rather than full time but Ms MacDonald applied for it in any event, got a bare acknowledgment, was not interviewed and was not appointed.

[7] Ms MacDonald then raised her personal grievance within 90 days of her sighting the job advertisement.

[8] The personal grievance letter was dated 29 July 2011 which was within 90 days of 3 June 2011. The effect of the earlier decision of the Authority is to accept that by raising a grievance within the statutory time limit of the event complained of, Ms MacDonald had met the legal test.

Issues

[9] Although Ms MacDonald accepted the redundancy when it first was effected, the subsequent decision of Optimum to advertise what she considered to be her *"former position"* effectively caused her to revisit her earlier conviction that the employer's decision ought to be accepted. In effect, Ms MacDonald's reasoning, based on the evidence, seems to have been that, by advertising a position which looked similar to her old position within five weeks of her termination, Optimum was calling into question the genuineness of the original redundancy.

[10] It follows that the first question the Authority needs to address is whether the redundancy was a genuine one or not, whether it was a redundancy undertaken with mixed motives, or was tainted by bias or other improper considerations.

[11] The Authority will then look at the process that Optimum used to effect the redundancy to establish whether that process was, in all the circumstances, a proper one.

Was the redundancy genuine?

[12] The Authority is satisfied the redundancy was genuine, notwithstanding Ms MacDonald's anxiety about the job advertised so soon after her departure from the workplace.

[13] Because that aspect is so central to the thrust of Ms MacDonald's claim, it is appropriate to deal with that first. The evidence led by Optimum was essentially that it made a mistake in its calculation of the number of staff it would need to maintain its business into the future. Ms MacDonald's redundancy was one of 14 in total and those workers had their positions disestablished as a consequence of a significant downturn in orders to Optimum. Ms MacDonald's evidence to the Authority was that she had noticed such a downturn before the redundancy process had commenced. So it is common ground that there was a decline in work, to put it at its most general.

[14] Mr Fawcett told the Authority that the month of April was when the bulk of the orders came in and it was only when the last of those orders became available to Optimum towards the end of April that Optimum was sure that it needed to declare redundancies.

[15] Mr John Sellar, a director of Optimum and a part owner who, like Mr Fawcett, worked in the business, was responsible for the administration. He told the Authority that Optimum had calculated the 14 redundancies based on the downturn in orders. In respect of Ms MacDonald's position particularly, part of it was to be absorbed by the remaining office staff (including Mr Sellar himself) and part of it would go back to the warehouse area.

[16] What Optimum did not take proper account of in its calculation of the proposed restructuring arrangements was the effect of the purchase of a new business on Optimum's ability to cope with the then existing staff levels.

[17] It was because of that increasing pressure that Optimum decided to advertise a new role some five weeks after the redundancies were effected. Optimum does not accept that this was Ms MacDonald's *"former position"*. It makes a number of points in that regard. First it says the position was part time rather than full time and secondly, Mr Fawcett makes the observation that the *"key difference between the position held by Fay* [Ms MacDonald] *and the advertised position was that the customer service function was no longer part of the job"*. Mr Fawcett then went on, in his evidence, to point out that customer service had been Ms MacDonald's forte.

[18] The Authority is satisfied on the evidence it heard that Optimum misunderstood the extent of the influence of the new business it had purchased and that it was that fact which impelled it to advertise a new position so soon after the redundancies.

[19] Further, the Authority is persuaded that the position which was advertised was not, as Ms MacDonald maintained, her *"former position"*. First of all, it was a part time role whereas Ms MacDonald's position had been full time and secondly it had the customer service function removed which was her particular area of expertise. While the balance of the duties required of the new position were also required of the position Ms MacDonald fulfilled previously, the two fundamental differences the Authority has highlighted, the change in hours and the change in duties, make this a different role.

[20] During the investigation meeting, the Authority invited the parties to comment on whether they thought that Optimum had a duty to offer the new position to Ms MacDonald and those observations have helpfully been included in the parties' submissions. For the avoidance of doubt, the Authority is clear that there could be no legal obligation to appoint Ms MacDonald to the new role, notwithstanding the very short time between her dismissal for redundancy and the advertising of the new position.

[21] This is so even although counsel for Ms MacDonald urges on the Authority the proposition that Optimum had a duty to offer Ms MacDonald the new position.

[22] The Authority does not consider that that submission correctly states the law; in the Authority's view, the most that can be said in the present circumstances is that there might have been a moral imperative to offer the role to Ms MacDonald, but it is

clear that there is no general obligation, in the absence of explicit contractual provisions, to give former employees preference for re-employment.

[23] In *Gates v. Air New Zealand Ltd* AC33/09, 11 September 2009, His Honour Judge Couch stated the law thus at para.[87]:

> *There is no general obligation on an employer who has dismissed an employee on grounds of redundancy to make the former employee aware of opportunities for re-employment or to give such a person preference for re-employment.*

[24] It follows that, in the absence of any explicit contractual provision, (and there is none here) Ms MacDonald cannot expect that Optimum will either make her aware of re-employment opportunities (which is not pleaded here), or give her preference over others for re-employment.

[25] In fact, the evidence Optimum led was that it gave consideration to Ms MacDonald's application but in the result chose to appoint to the new position an applicant who in its view was better suited to the range of skills the position required.

[26] Looking at the matter in the round, the Authority is satisfied that the evidence before it discloses that this was a genuine redundancy for proper commercial purposes and that there was no sense in which Optimum sought to rid itself of Ms MacDonald's services for any impure motive.

[27] Indeed, all the evidence suggests that Optimum thought highly of Ms MacDonald, was embarrassed about the need to make her position redundant, particularly as there was a strong family connection; Ms MacDonald's brother is a shareholder in the Optimum business.

[28] Further, the Authority is satisfied that the reason that the new position was advertised so soon after the redundancy was because of a genuine error made by the directors of Optimum as to the firm's requirements for labour going forward.

[29] On the face of it, the evidence before the Authority suggests that, were it not for the new position advertised on and around 3 June 2011, Ms MacDonald herself would have accepted that the redundancy was genuine. Certainly it is the case that there was no challenge from her to the termination of her employment until she saw the advertisement for the new position. Of course, her hurt at seeing that new position advertised was materially contributed to by her conviction (mistaken in the

Authority's view), that the new position was her old position in disguise. For reasons already advanced, the Authority does not accept that view. The Authority has been persuaded that, by virtue of its part time nature, and its different focus, the new position is indeed just that, a new position and not a reworking of an old one.

Was the process fair?

[30] The complaints about the process revolve around Ms MacDonald's contention that there was one meeting between herself and Optimum's directors, at which she was told that she was to be dismissed for redundancy.

[31] Conversely, Optimum's directors maintain that there were in fact two meetings with Ms MacDonald, on either side of a long weekend, and the contention of Optimum is that its process fulfilled the legal requirements.

[32] It is common ground that at the time that Optimum was steeling itself to engage with affected staff about the likelihood of redundancy, Ms MacDonald was on leave. Because of that, Ms MacDonald, by common consent, missed the first general meeting where Optimum spoke to the affected staff. That *"general"* meeting was the precursor to a series of individual meetings between Optimum's directors and each affected staff member.

[33] Because Ms MacDonald was on leave when the *"general"* meeting of staff took place, Optimum's directors decided the proper course of action was to call her in so that they could have a *"one-on-one"* meeting with her. The evidence the Authority heard suggested that Optimum gave consideration to whether the matter could be left until Ms MacDonald returned to duty. But the conviction was that someone from the wider group of affected staff might contact Ms MacDonald at home and tell her what was going on.

[34] Accordingly, Optimum called Ms MacDonald in and held a meeting with her on 21 April 2011. Not only is Ms MacDonald adamant in her evidence that that was the only meeting she attended, but she is equally adamant that the decision to make her position redundant was presented to her as a *fait accompli* and not as a provisional conclusion on which submission and alternative views were invited.

[35] Ms MacDonald told the Authority in her oral evidence that at the 21 April 2011 meeting Mr Fawcett said something to the effect:

I am available to ring over the weekend if you have any questions.

[36] Ms MacDonald reported that she responded with words to the effect:

What questions would I have? You have already made your decision.

[37] Critically, Ms MacDonald says that she got an affirmative response to that question.

[38] Mr Fawcett, who struck the Authority as a thoughtful and honourable man, denies that that exchange accurately reflects what happened. He agreed that there had been an offer of phone contact but denies the contention that the decision was a *fait accompli*. The reason the issue of phone contact is important is because 21 April 2011 was the last working day before the Easter break in 2011 and Optimum intended that its directors be available over the holiday weekend to Ms MacDonald, if there were issues that she wished to talk through, or indeed suggestions she wanted to make, having been confronted with the employer's provisional conclusion that redundancy would be necessary.

[39] Equally importantly, Optimum rejects Ms MacDonald's claim that the 21 April 2011 meeting was the only one; it is adamant that there was a second meeting on Tuesday, 26 April, after the Easter break. According to Optimum's witnesses, the effect of that second meeting, which was admittedly brief, was that *"as there were no alternative workable suggestions … her position was redundant"*.

[40] There were two Optimum directors present at the two meetings that Optimum maintains took place. Mr Fawcett was one and the other was Mr Sellar. Both of them are adamant that there were two meetings and equally adamant that at the first meeting, there was no sense in which a *fait accompli* was being presented.

[41] It was evident at the investigation meeting that Optimum had sought professional advice about how to undertake a redundancy consultation. The evidence for Optimum is that, with the exception of the first general meeting of staff which it is accepted Ms MacDonald did not attend, the approach that Optimum directors took to engaging with the affected staff was the same for each and every staff member.

[42] Amongst other things, Mr Fawcett indicated that he explained to each affected staff member the criteria for selection under three broad heads, namely:

- *Proportionally by department;*

- *Last-in-first-out; and*
- *Skill set*

[43] Ms MacDonald denies hearing any of that and maintains that she was simply told on 21 April 2011 that her job had gone. She supports that contention by alleging that on the first work day after the Easter break, Tuesday, 26 April 2011, she found that her work routines had already been transferred to somebody else when she came to work that day. That evidence is denied by Optimum. Optimum makes the point that as Ms MacDonald had been away for a period recovering from the consequences of some medical treatment, of necessity it had made some changes to ensure that work that she would normally have performed was still being done. As Tuesday, 26 April 2011 was Ms MacDonald's first day back after that period of leave, that contention by Optimum is a credible one.

[44] In the end, the Authority finds it difficult to accept that Optimum would have applied a different process in the one-on-one discussion it had with Ms MacDonald, to the one-on-one discussions it had with all the other staff. It had gone to the trouble to get proper advice and its directors' evidence, on oath, was that they had followed that advice to the letter.

[45] The Authority was impressed with the demeanour of both Mr Sellar and Mr Fawcett and in the end, preferred their evidence to the evidence of Ms MacDonald. It is difficult to see why Optimum would have gone to the trouble of getting advice and then following that advice in respect of some, but not all, of its staff.

[46] Having said that, the Authority must say that it was impressed with Ms MacDonald's demeanour in giving her evidence too and is sure that her evidence was honestly believed. That said, the Authority must decide whose evidence is to be preferred. On the balance of probabilities, the Authority is satisfied that Mr Fawcett agonised over the whole redundancy process, particularly in relation to Ms MacDonald because of the family connection, and that because of his personal feelings, he would have used the advice he received from his legal adviser as a determinative guide.

[47] It follows that the Authority prefers Optimum's view that the first meeting was not a *fait accompli* and was talking about a proposal, that there was a genuine opportunity for Ms MacDonald to contact the directors over the weekend to discuss

matters, and that there was a second meeting on 26 April 2011 at which the redundancy decision was made final.

[48] In the course of giving her evidence, Ms MacDonald told the Authority that the job that she had been made redundant from was, in her view, capable of being performed on a part time rather than a full time basis. This is precisely the sort of information that a staff member ought to share with an employer in a redundancy situation. But it seems apparent from the evidence of both parties that that intelligence was not advanced by Ms MacDonald in her contacts with Optimum. Had she advanced that view, it is conceivable that Optimum might have re-thought its provisional view.

Determination

[49] The Authority has not been persuaded by Ms MacDonald that she has a viable personal grievance and accordingly her claim fails.

Costs

[50] Costs are reserved.

James Crichton
Member of the Employment Relations Authority