

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Gina Maxwell (Applicant)
AND Brown Miller Press Limited (Respondent)
REPRESENTATIVES John Shadbolt, Advocate for Applicant
Marc Potter, Advocate for Respondent
MEMBER OF AUTHORITY R A Monaghan
INVESTIGATION MEETING 14 December 2004
SUBMISSIONS RECEIVED 17 and 23 December 2004
DATE OF DETERMINATION 11 January 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Gina Maxwell says she was unjustifiably dismissed by her former employer, Brown Miller Press Limited (“Brown Miller”). Ms Maxwell’s employment ended by reason of redundancy.

Background

[2] Ms Maxwell’s employment began in June 2003. Her position was receptionist/office assistant. She worked with an office manager, Jo Griffin, and both reported to Peter Aldous, the group finance manager. Brown Miller is part of a group of companies, and Marc Potter is the managing director.

[3] Unknown to Ms Maxwell, when in 2001 Mr Potter and his interests purchased the business known as Brown Miller Press, the business was bankrupt (Mr Potter’s word for its financial state). After the purchase its continued operation was supported by bank loans, but the business was not profitable. In 2003 Mr Potter and his interests embarked on a process of rationalising assets and repaying the loans, but in December 2003 the bank required the sale of Brown Miller Press or it would call in payment of the loans. Instead Mr Potter sought to refinance elsewhere, and during the first half of 2004 worked on business plans and budgets that would satisfy the new lender. In connection with that process high overhead costs had been identified among other things, hence the staffing structure at Brown Miller came under scrutiny.

[4] Ms Maxwell was informed of this in a general way, through a series of meetings with Mr Aldous during early-mid 2004. Mr Aldous advised that the company’s administration procedures were under review, that changes were needed and the company needed to become profitable. He also advised that administration costs were too high. For her part Ms Maxwell was aware an

independent accountant was working with the company and that there were financial problems, but was not aware of the extent of the difficulties.

[5] In the early stages of the discussions with Ms Maxwell Mr Aldous did not mention the possibility of positions being made redundant, but said in evidence he knew an administration position would have to disappear or be absorbed elsewhere in the business. Mr Potter confirmed that by the end of February he had decided to reduce administration staff by one full time equivalent position, but there had not been a decision about how this would be achieved. At the time the preference was to reorganise positions rather than impose redundancies. Administration was not the only area affected, and discussions with certain other staff members aimed at restructuring their remuneration led to three resignations.

[6] Meanwhile, as Ms Maxwell put it, she had outgrown her position and sought new challenges. Indeed the duties associated with her existing position did not fill a working day. The company's production assistant resigned and had not been replaced, so Ms Maxwell was encouraged to take on some of that person's duties including dealing with outwork and materials suppliers, and answering customer queries about the progress of jobs. She also provided other assistance to the production manager of an essentially clerical nature. However there was no suggestion that she was offered the technical duties associated with the position.

[7] Such was the encouragement she received, Ms Maxwell believed she had been offered the position of production assistant and Brown Miller's alleged failure to retain her in that position is part of this employment relationship problem. Indeed Ms Maxwell was a highly-valued employee who had good relationships with her colleagues and the management staff. It is not difficult to understand why she would have received encouragement from people who wanted to support her in expanding her skills and who did not want to lose her. At the same time, when I asked her why she believed she had been offered the production assistant's position she said it was because Mr Aldous had asked her if she was interested in it. She acknowledged no actual offer was made, but she believed she was being considered for the position and that she would be capable of carrying out the full duties with training.

[8] By the end of April 2004 Brown Miller had received the final accounts for the year ending 31 March 2004. The position the accounts disclosed was not the hoped-for one, which increased the pressure on the company in its attempts to obtain alternative finance. Two of the resignations also meant that, during May and June, Brown Miller was forced to make a decision about and act on restructuring its staffing requirements.

[9] The at-risk positions in administration were Ms Maxwell's and Ms Griffin's. However Ms Griffin's was a senior role, and Mr Potter decided to retain it. The duties associated with the receptionist/office assistant's position could be shared among remaining staff members, and that is what happened.

[10] As for production, as a result of the resignations Mr Potter decided the company needed a production co-ordinator as well as retaining the position of production manager. The former was a new position, replacing the production assistant's position and encompassing some of the duties from one of the remaining vacant positions. Mr Potter himself also intended to take on some of the duties of the other vacant position. The nature of the production co-ordinator's position meant the appointee would have to be a printer or a pre-press technologist, and Mr Potter sought an immediate start. In other circumstances there may have been scope for training Ms Maxwell into a full time production support position, but her clerical rather than printing-oriented skill base meant far more time would be required for training than was available to the company in the light of its financial difficulties.

[11] Accordingly, in late June 2004 Mr Potter instructed Mr Aldous to advise Ms Maxwell her position was being disestablished and her employment terminated. Mr Potter gave Mr Aldous a letter to Ms Maxwell dated 2 July 2004, which advised of the restructuring of roles in the administration function and the elimination of Ms Maxwell's position. The letter gave Ms Maxwell one month's notice of the termination of her employment and offered reasonable time off for seeking new employment. Mr Aldous was planning to meet with Ms Maxwell and give her the letter on that date.

[12] Unfortunately, on the morning of 2 July Ms Maxwell had approached Mr Aldous to request a pay rise in respect of what she saw as her new position as production assistant. The request was so out of keeping with the message Mr Aldous thought he had been conveying about the state of the company's finances that his evidence was in effect that he was stunned and said nothing. He then gave a non-committal response and the conversation ended. Later that day he sought the meeting at which he advised Ms Maxwell of her redundancy. On the evidence I heard I accept without hesitation that the two were not connected.

[13] During the meeting Mr Aldous handed Ms Maxwell the letter and expressed his genuine regret at what had happened. He told Ms Maxwell that Brown Miller had decided to employ someone from outside the company, who happened to be a former employee in the production department, for the production co-ordinator's position and that he had supported the retention of a suitable position for Ms Maxwell.

[14] The former employee had printer's, estimator's and production planning qualifications and experience.

[15] After the meeting a sales colleague advised Ms Maxwell of a vacancy with a client of Brown Miller's. The client offered a position reasonably promptly, so Ms Maxwell approached Mr Aldous with a request that she be released from her employment at Brown Miller by Friday 16 July. Mr Aldous' initial response was to refuse because the production co-ordinator was to commence employment on Monday 19 July and he wanted Ms Maxwell to help train him. This news upset Ms Maxwell because she feared any delay in her availability to commence her new employment would jeopardise it, and because she felt she was being asked to train her replacement.

[16] Her fear regarding her new employment was unlikely to be well-founded, and Ms Maxwell was being asked to train the production co-ordinator only in those of her clerical duties being devolved to him. He was not her 'replacement' in any sense other than the fact that some of her former duties became part of his job. Ms Maxwell was not, and could not be, asked to train him in the substantial technical aspects of the position and had not been offered the position herself. It transpired that she could be released early in any event, so that she was asked to stay on simply to assist with processing payments due to suppliers on the 20th of the month. She left Brown Miller on Thursday 22 July.

Determination

[17] Since I accept Ms Maxwell's redundancy was genuine, and imposed for genuine reasons, the outstanding issue concerns the method by which it was implemented.

[18] Mr Aldous' attempts to consult with Ms Maxwell about the matter took the form of the meetings during which he warned of the company's need to make changes and to achieve profitability. His personal experience of having been made redundant meant he took a protective and paternalistic approach and attempted to shield Ms Maxwell from knowledge of the risk to her existing position. Accordingly he did not spell out to her the jeopardy in which it stood. While

some people might have guessed at the possibility from the information Mr Aldous did provide, Ms Maxwell did not.

[19] Even if Ms Maxwell had appreciated the possibility, the concurrent encouragement concerning her provision of assistance to the production department had to be placed in its proper context or there was a risk she would receive a mixed message at best. As matters stood her existing position was already dwindling and was in an area where the need for cost cutting had been identified, against a wider background of corporate financial difficulties. In essence Brown Miller was looking to redeploy Ms Maxwell into an expanded role which included some production support. The unspoken alternative was that, otherwise, there would be no position for her. Not spelling out to Ms Maxwell the jeopardy in which her existing position stood, as well as the reason for it and efforts to preserve a position for her anyway, led to Ms Maxwell being unable to link the information she was given about the company's financial circumstances with its attempts to preserve a position for her.

[20] The failure to specify the risk to Ms Maxwell's existing position, and make clear that the encouragement to move into production was intended not only to broaden her skill base but to preserve her ongoing employment, was a flaw in the consultation process. It is true that the early provision of such information can unduly alarm some people, but bearing in mind her obvious personal qualities Ms Maxwell could have been given more credit for being likely to understand and possibly accept what was happening in the company, and to her position, than she was. In any event, while Brown Miller was not necessarily obliged to provide Ms Maxwell with full financial information, employers' obligations to employees include an emphasis on providing more information rather than less when redundancies are possible.

[21] The constructive efforts the company made to preserve a position for Ms Maxwell nevertheless mean I might have been prepared to conclude the flawed consultation process did not vitiate the justification for the redundancy. However handing Ms Maxwell her letter of termination on 2 July, without warning and still without having given her the opportunity to comment directly on the matter, was also a flaw in the implementation of the redundancy. It tips the balance in favour of a finding that the overall procedure was sufficiently unfair to vitiate the redundancy.

[22] I therefore find that the dismissal was unjustified. Ms Maxwell has a personal grievance.

Remedies

[23] Reimbursement of remuneration lost as a result of the grievance was, very properly, not sought.

[24] As she is entitled to under the Employment Relations Act 2000, Ms Maxwell has sought compensation for the injury to her feelings resulting from her personal grievance. Much of the evidence on the point concerned her feeling that she wrongly denied a position in production that had been offered to her and subsequently that she was replaced in that position by someone else, when such was not the case. The evidence also addressed her feelings about the response to her request for an early release from employment, when Brown Miller was not at fault in that respect. However there was also evidence of her upset as a result of the decision conveyed to her on 2 July. She is entitled to compensation for the injury caused by the flaws in the way the decision was made and conveyed.

[25] Brown Miller is therefore ordered to compensate Ms Maxwell for the injury to her feelings in the sum of \$3,000.

Costs

[26] Costs are reserved.

[27] The parties are invited to agree on the matter themselves. If they wish the Authority to determine costs they should advise it promptly in writing with copies to each other, and provide the reasons in support of their positions.

R A Monaghan
Member, Employment Relations Authority