

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Nicole McMillan (Applicant)
AND Inter Pacific Logistics Ltd (Respondent)
REPRESENTATIVES Keshwant Kaur, for the applicant
Lorne Campbell, for the respondent
MEMBER OF AUTHORITY Marija Urlich
INVESTIGATION MEETING 22 February 2005
FURTHER INFORMATION RECEIVED 2 May 2005
SUBMISSIONS RECEIVED 29 March and 14 April 2005
DATE OF DETERMINATION 2 May 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ms McMillan was made redundant from her position as an export supervisor with Inter Pacific Logistics Limited ("IPL") on 21 November 2003. She says her redundancy was not genuine and was carried out with undue haste and in a harsh manner. Ms McMillan seeks the following remedies; reimbursement of lost wages, compensation for hurt, humiliation and injury to feelings, and penalties for breaches of good faith obligations and a contribution to costs. Ms McMillan also seeks to substitute the respondent for what she says is the true employer.

[2] Inter Pacific Logistics Limited ("IPL") says Ms McMillan's dismissal was justifiable. It says her redundancy was genuine and was implemented in a fair and reasonable manner.

[3] IPL is a freight forwarding business. It ceased to trade on 30 June 2004 and continues to exist to collect monies owing to it and to pay creditors. In June 2004 Inter Pacific Logistics (New Zealand) Limited was incorporated.

[4] The issues for the Authority to determine in this employment relationship problem are:

- (i) was Ms McMillan's dismissal for redundancy genuine justified?;
- (ii) did IPL's conduct breach the obligations under section 4 (4) of the Act warranting a penalty?; and
- (iii) should the respondent be substituted for Inter Pacific Logistics (New Zealand) Ltd?

[5] At the investigation meeting I received evidence from Ms McMillan, her husband Steve McMillan, Christopher Eastwood, a director of IPL and Wayne McGowan, IPL's then sales

manager. Further information and written closing submissions were received subsequent to the investigation meeting.

Background

[6] IPL started business in early 2002 and Ms McMillan was one of its first employees, commencing employment in March 2002. In 2003 IPL experienced financial difficulties. IPL took steps to address these difficulties and in January 2003 Ms McMillan along with all other staff were asked and agreed to take a pay cut. Ms McMillan's salary was reinstated in June 2003. She told me she assumed it had happened because IPL had overcome its financial difficulties. Mr Eastwood said salary was only reinstated for Ms McMillan and one other staff member at their request.

[7] The mid-October monthly accounts showed IPL was facing severe financial difficulties. Mr Eastwood met urgently with his fellow director, Chris McCabe and the sales manager, Wayne McGowan, and decided decisive action had to be taken. They implemented cost savings in purchasing and took advice on making staff redundant.

[8] On Wednesday 19 November Ms McMillan was called into a meeting with Mr Eastwood and Mr McGowan in the tea room. All staff had attended meetings throughout the day and the request came as no surprise to Ms McMillan. There was nothing unusual about meeting in the tea room which is a private space.

[9] At the outset of the meeting Mr Eastwood told Ms McMillan the purpose of the meeting was to let her know performance appraisals had been completed for all staff with a view to possibly making one or two staff members redundant, that they wanted to go through Ms McMillan's appraisal and ask for her comments. She was given a copy of her completed appraisal and they discussed it. Ms McMillan signed the appraisal. She said she was pleased with it. Mr Eastwood then told Ms McMillan that it was likely it would be her position which would be made redundant because he could do her job. Ms McMillan was then asked to have the following day off to think of alternatives to her position being made redundant and was invited to attend a meeting on Friday 21 November at 10am with a support person present.

[10] Ms McMillan attended the scheduled Friday meeting with her husband. On entering the office she saw her computer had been moved onto the desk opposite hers and Mr Eastwood was working on his laptop at her desk. Ms McMillan said she had nowhere to sit and she felt disillusioned because she thought the decision to make her redundant had already been made.

[11] At the meeting with Mr Eastwood Ms McMillan made no alternative suggestion to her position being made redundant other than to query why an office junior had been employed two months before. Mr Eastwood then confirmed her redundancy. Ms McMillan was told she would receive four weeks pay in lieu of notice. Mr McGowan's notes of the meeting were confirmed by the witnesses as accurate. Ms McMillan then left the office. Her husband collected her personal items and a reference the following week.

Determination

(i) Was Ms McMillan's dismissal justified?

[12] I accept that IPL was facing serious financial difficulties in late 2003 which required the directors to take steps including a review of staffing levels. Having gone through a review process Mr Eastwood determined Ms McMillan's position should go because he could absorb the work himself. I accept IPL had good reason to make Ms McMillan's position redundant. It follows

therefore that there can be no award for lost wages.

[13] However, I do not accept Ms McMillan's redundancy was handled in manner which was fair or sensitive. While I accept Ms McMillan's work had to be performed while she was given leave to consider her response to the restructuring proposal it was insensitive to allow Ms McMillan to re-enter the work place without giving her prior notice this had occurred. In the circumstances it was reasonable for Ms McMillan to conclude the decision to make her position redundant had already been made.

[14] IPL failed to adequately respond to issues raised by Ms McMillan. In the dismissal meeting Ms McMillan asked why a junior had been taken on in September. In the context of a meeting set up to hear her response to a redundancy proposal this was a fair question and she was entitled to an answer. No answer was given.

[15] IPL failed its obligations to Ms McMillan when it did not consult with her regarding whether or not she would work out her notice period. Ms McMillan did not have a written employment agreement and the parties had not discussed or agreed notice provisions in the event of redundancy. In such circumstances consultation over how Ms McMillan's notice would be effected would have been fair and reasonable.

[16] Redeployment was not discussed with Ms McMillan. However, I accept that in the particular circumstances of this small struggling business this was not an option.

[17] For the reasons set out in paragraphs 13 – 15 above I find Ms McMillan's dismissal for redundancy was unjustified.

(ii) Who is the respondent?

[18] Ms McMillan has sort to have Inter Pacific Logistics (New Zealand) Limited ("IPL (NZ) Ltd") substituted for the named respondent. Ms Kaur submits IPL (NZ) Ltd is the true employer and that it was incorporated for the purpose of escaping creditor liability. There is no evidence to support this claim. IPL (NZ) Ltd was incorporated in June 2004, some seven months after Ms McMillan's dismissal. IPL continues to trade. There is no evidence of asset transfer between the companies and the directors and shareholders are not identical. There is no reasonable basis upon which to substitute IPL (NZ) Ltd for the respondent and I decline to do so.

(iii) Did IPL breach its good faith obligations?

[19] Ms McMillan says the redundancy selection process breached the good faith obligations owed to her under section 4(4) of the Act because she had been led to believe her position was secure when her salary was reinstated in August 2003 and her selection for redundancy was pre-determined in that a junior staff member was taken on in September 2003 and not selected for redundancy and three months after Ms McMillan's redundancy an employee was taken on to perform a similar role to hers.

[20] For the reasons set out above I have found Ms McMillan's redundancy was motivated for a genuine reason. No breach of the good faith obligations has occurred in that regard.

[21] Section 4(4)(d) and (e) extend good faith obligations to proposals such as redundancy and requires any consultation conducted is done so with regard to those obligations. I have found IPL failed to consult with Ms McMillan fairly and reasonably in relation to some aspects of the redundancy process and in this regard have breached the obligations of good faith. However, I

agree with Mr Campbell's submission that no penalty can be awarded against IPL with regard to any breach of section 4(4) of the Act because those amendments apply only to employment relationship problems arising after 1 December 2004. The appropriateness of a penalty cannot be considered any further.

[22] Turning to the alleged aspects of pre-determination amounting to breaches of good faith.

[23] The selection process was carried out following the completion of the performance assessments and Mr Eastwood's conclusion that he could absorb Ms McMillan's duties. Ms McMillan was asked to comment on the assessment form, was told of the proposal to make her position redundant and the reason why and provided with an opportunity to comment on that proposal. IPL's poor handling of the situation may have failed to meet the required standard of fair and reasonable practise in such circumstances but it does not vitiate the selection process leading up to the advice to Ms McMillan she was redundant.

[24] The reinstatement of Ms McMillan's salary may have provided a sense of security but this does not amount to a guarantee of ongoing employment. Reinstatement of salary does not amount to a breach of good faith.

[25] The employment in September 2003 of a junior and his non-selection for redundancy does not amount to a breach of good faith when a transparent selection process was conducted and the parties had not agreed to "last-on first-off".

[26] The employment of someone in a similar role to Ms McMillan's three months after her redundancy did not breach any good faith obligation owed to Ms McMillan. She did not have a contractual entitlement to reemployment post redundancy and the evidence does not establish any link between her redundancy and the creation of this new position.

Remedies

[27] Having regard to the evidence on this issue I award Ms McMillan the sum of \$3000.00 pursuant to section 123 of the Employment Relations Act 2000.

Costs

[28] The issue of costs is reserved. I invite the parties to attempt to resolve this issue themselves. If they are unable to do so they may request the Authority determine this issue.

Marija Urlich
Member of Employment Relations Authority