

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 155/09  
5146654

BETWEEN                      DIANE VIVIEN MILLER  
   Applicant  
  
AND                                RECEIVABLES  
   MANAGEMENT (NZ)  
   LIMITED  
   Respondent

Member of Authority:      Philip Cheyne  
  
Representatives:            Jenny Guthrie, Counsel for Applicant  
   Jen Wilson, Counsel for Respondent  
  
Investigation Meeting:    29 April 2009 at Dunedin  
  
Submissions:                13 May 2009 from the applicant  
   27 May 2009 from the respondent  
  
Determination:              11 September 2009

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

[1] Diane Miller worked for Receivables Management (NZ) Limited (RML) from about May 2006 until May 2008 when her employment was terminated by the company. Ms Miller says that she was unjustifiably dismissed however the company says that Ms Miller's employment was terminated justifiably as the result of a genuine redundancy situation. Ms Miller also says that she was unjustifiably disadvantaged as a result of events shortly before the dismissal.

**RML's business**

[2] RML operates a debt collection business collecting debt on a contingency basis on behalf of clients (contingent debt). An associated company buys debt from

clients and attempts to collect it on its own behalf (bought debt). The companies share some resources but are essentially operationally independent as well as legally distinct.

[3] RML's Dunedin branch comprises a call centre employing about 10 staff and one employee designated as a collections officer. The call centre dealt with both contingent debt for RML and bought debt for the associated company whereas RML's Dunedin collections officer only dealt with contingent debt for RML. The associated company employed collections officers in Dunedin and elsewhere. RML's Dunedin call centre staff do not liaise with clients whereas the collections officer did and also undertook a wider range of debt collection activity and investigations on a file. Since Ms Miller's dismissal there has not been a dedicated contingent debt collections officer position.

[4] Don Brewer is RML's Dunedin branch manager with the usual line management responsibility for the branch staff. He has an overseer role but no line management responsibility with respect to the associated company's Dunedin employees.

### **Terms of employment**

[5] Ms Miller initially worked in RML's call centre from 2006. In early 2007 RML's collections officer left and Mr Brewer offered the vacant position to Ms Miller. There is a signed employment agreement dated 23 April 2007 for the position of *Collections Officer*.

[6] The employment agreement defines redundancy as *a situation where the position of an employee is or will become surplus to the requirements of the Employer's business*. Other subclauses stipulate the agreed redundancy process, the notice period (14 days) and that no redundancy compensation is payable.

[7] As a *collections officer* Ms Miller started out doing administration and reception work as well as the collections work. That mirrored the person who she replaced. The administration and reception work was reallocated after several months and an office junior was employed for that purpose. There is a dispute about whose initiative this was, whether at Ms Miller's request because she could not keep up with the collections work or at Mr Brewer's direction because Ms Miller could not keep up. However it is common ground that Ms Miller was struggling with all her new

responsibilities and it was agreed at the time that her duties would be limited to the collections work. That reflects clause 2.2 in the employment agreement that *These duties may be modified and updated by the Employer from time to time following agreement with the Employee*. There is no reason now to challenge this agreement about changed duties so it is not necessary to resolve the dispute about who initiated the change.

### **Management rights**

[8] When Ms Miller was appointed to the *collections officer* role she was given the ability to edit various fields in RML's computer records, a capacity referred to by the parties as *management rights*. That was atypical for RML's collections officers elsewhere but reflected Ms Miller's other responsibilities. These management rights were not changed when Ms Miller's duties were limited to the debt collections work.

[9] An issue arose when Ms Miller used her management rights to edit a field when she should not have. In her evidence Ms Miller acknowledged that while it was *possibly misconduct* on her part she was not given any warning. Rather, Ms Miller's management rights were removed to bring her into line with RML's collections officers in other branches.

[10] Ms Miller found it inconvenient not having management rights. I accept Mr Brewer's evidence that Ms Miller complained bitterly so he reinstated her management rights.

[11] On 1 May 2008 RML's IT department discovered that a payment record on a file had been transferred from the relevant collections officer collector to Ms Miller. That resulted in IT finding out that Ms Miller's management rights had been reinstated by Mr Brewer. Mr Brewer was admonished for doing this and instructed to remove Ms Miller's management rights. Mr Brewer went and spoke to Ms Miller about this.

[12] Ms Miller says that she was *falsely accused of changing a collector code*. However, Mr Brewer did not take up the matter with Ms Miller as an allegation of misconduct, and I accept his evidence that he did not reach any conclusions about Ms Miller's culpability. He told Ms Miller that IT had told him about the code change by someone using Ms Miller's logon and password. Ms Miller denied changing the code. Mr Brewer told her that he was removing her management rights and, in

response to her protestations, that he was being directed to do so. I accept Mr Brewer's evidence that Ms Miller did not appear upset at the time.

[13] Ms Miller says that this discussion should have been had privately rather than in the open office area. There is a dispute about precisely where Mr Brewer and Ms Miller were at the time of the discussion but it is common ground that it was not in Mr Brewer's office. Ms Miller also says that Mr Brewer should have gone back to management with her denial of making any change. There would be merit in these criticisms if there had been any disciplinary aspect to the exchange between Mr Brewer and Ms Miller. However, all that happened was that Mr Brewer had been told about the code change and he was instructed to limit Ms Miller's computer access rights to match that afforded RML's other collections officers. Ms Miller's employment was not disadvantageously affected by this so no grievance can arise.

[14] Later on 1 May, when Ms Miller went to edit a field in the computer records she found that Mr Brewer had implemented the change to her computer access rights. Ms Miller accepted in evidence that she should not have attempted to edit this field. I accept that Ms Miller felt that she had been unfairly accused of the earlier change (although I do not accept that Mr Brewer actually did so). Ms Miller was also under considerable stress for personal reasons. Combined, these factors caused her to pack up her stuff, tell Mr Brewer she had had enough and was going home. Ms Miller left the premises. Her evidence is that Mr Brewer chased her up the street. That puts an unwarranted spin on what happened. Mr Brewer went after her. When he caught up with Ms Miller on the street they had a brief conversation. Ms Miller's evidence is that Mr Brewer made it clear that she would lose her job if she did not go back to work. Mr Brewer's evidence is that he said it was Ms Miller's decision but he was not clearing her to leave the office early that day. I prefer Mr Brewer's evidence about this.

[15] Ms Miller did not go to work on 2 May as unexpectedly she had to look after her daughter. She sent a text message to Mr Brewer to that effect and received the response *we will discuss your options on Monday*. That sounded ominous to Ms Miller.

**Monday 5 May**

[16] In her statement of problem Ms Miller says that she was called into the office and demoted by being told she must return to work in the call centre while her contingent debt recovery work was to be allocated to another employee. Ms Miller says that she had another person with her at this meeting because she was apprehensive as a result of Mr Brewer's text message.

[17] RML says that Ms Miller was temporarily reallocated to the call centre while RML reviewed the need for Ms Miller's existing position. RML relies on clause 2.2 of the employment agreement, part of which is set out above.

[18] There is a typed note headed *RE-ALLOCATION OF COLLECTOR POSITION*. It is signed by Ms Miller and Mr Brewer. It was given to Ms Miller during the meeting on Monday morning and she signed it after the meeting. RML's case is that by signing the note Ms Miller accepted the temporary reallocation to the call centre.

[19] Ms Miller says that when she was given the letter reallocating her to the call centre she asked how her work could be taken off her and given to someone else to be told that she had been coming to work *teary eyed* and had taken too much time off. Ms Miller's evidence is that she felt quite threatened with Mr Brewer standing over her telling her she had to sign the letter. She says she signed it because she had no choice.

[20] Ms Miller does not impress as a person who would be intimidated into doing something against her will. It is also clear that she took the note away after the meeting so she had an opportunity to consider what to do in response to the discussion during the meeting. I do not accept that Mr Brewer *stood over* Ms Miller or otherwise forced her to sign the note. On balance I prefer Mr Brewer's evidence about the meeting. He offered Mr Miller the opportunity to have a support person with her (consistent with his advice about how to conduct the meeting); he explained to Ms Miller about the temporary reallocation to the call centre while workloads were being reviewed; he said that the contingent debt work would be handled by another employee meantime; he told Ms Miller that while in the call centre she would need to work more regular hours, not arrive in tears or take time off at will; he also told Ms Miller that her pay would not change. I find that by signing the note Ms Miller agreed

to the temporary reassignment. I do not accept that this amounted to a unilateral demotion. It was made clear to Ms Miller that her pay would not change and that it was a temporary arrangement. On that basis she agreed to it.

[21] Ms Miller now complains about only being given two hours to hand over work to another employee as part of this arrangement. A handover was part and parcel of the arrangement that Ms Miller consented to at the time. There is no merit in a complaint now.

[22] Part of Ms Miller's complaint is that placing her back on call centre work exposed her to harassing phone calls from a woman called Christine. The calls at work were unrelated to Ms Miller's employment and had been a problem at an earlier point in time. Ms Miller received appropriate support from Mr Brewer and RML on the earlier occasion and when the harassment resumed so I do not accept there is any merit in Ms Miller's criticism. However, the harassment still caused her significant distress and was the main reason for her getting upset on 1 May.

### **Restructuring**

[23] On Friday 16 May Mr Brewer called Ms Miller into his office and gave her a document entitled *Restructuring Proposal*. To summarise, the document says that the amount of contingent debt collection work has decreased significantly giving rise to a proposal that the relevant full-time position be disestablished resulting in a surplus staff situation. The document sets out the timetable for consultation with the deadline for any response set for 3pm on Friday 23 May. Ms Miller was permitted to finish work early after having been given this document.

[24] Ms Miller attended work on Monday 19 May but at lunchtime she went to the doctors and was certified as unfit for work for the next 4½ days. Ms Miller gave her medical certificate to Mr Brewer at the end of the day. Mr Brewer asked her if she was going to come to the meeting on Friday. Ms Miller answered *No* and said that she preferred to get two weeks pay instead of having to work out her notice period. Ms Miller also said that she had no options in response to the consultation offer and that she was past caring.

[25] On 20 May Mr Brewer wrote to Ms Miller confirming their discussion from the previous day and advising her about her final pay arrangements which were implemented promptly.

[26] On 3 June Mr Brewer phoned Ms Miller and offered her a position in the call centre that had become vacant as a result of another employee leaving. In her evidence Ms Miller says that she turned down the offer because she felt unable to go back to work at that time due to the stress from the harassment by Christine. She also questions why she would accept a call centre position when she had been intending to resign from that role just before being offered the *collections officer* position in April 2007. Ms Miller's evidence is that she was on a sickness benefit for 3 months after the termination of her employment before transferring to a study benefit.

### **Raising the grievance**

[27] By letter dated 16 June Ms Miller's solicitor raised grievances of unjustified disadvantage and unjustified dismissal. The former grievance concerned her being reallocated into the call centre following the events of 1 May and 5 May. The latter grievance concerned her selection for redundancy and the dismissal.

[28] Despite mediation, these problems have not been resolved.

### **Disadvantage**

[29] In essence I accept RML's position that the transfer on 5 May to the call centre was sanctioned by clause 2.2 of the employment agreement.

[30] Ms Miller consented to her reallocation to the call centre by signing the memo dated 5 May 2008. The background to that was the reduced volume of contingent debt recovery work over the preceding months and Ms Miller's familiarity with the call centre work. What came with this reallocation was the transfer of the remaining contingent debt recovery work to another employee and the promise in the memo of a review by 30 June to ascertain whether *a. the transition has been completed b. Determine Call Centre requirements, and c. If Diane is happy in this new role.*

[31] Ms Miller's agreement to all this effectively varied her terms of employment. In light of that I do not accept that there was any unjustified action by RML disadvantageously affecting Ms Miller's employment – there was simply an agreed change.

[32] I note the earlier finding that Ms Miller was not disadvantaged as a result of the change to her computer editing rights.

[33] The grievance claim in respect of the events on 1 May and 5 May fails.

### **Dismissal**

[34] To justify its decision to dismiss Ms Miller, RML must show that its actions and how it acted were what a fair and reasonable employer would have done in the circumstances at the time.

[35] The employment agreement defines redundancy as *a situation where the position of an employee is or will become surplus to the requirements of the Employer's business*. Mr Brewer told me regarding the 5 May memo that *We needed to put a stake in the ground and work out what to do. It was to put things in a holding pattern while we sorted out what to do*. He was referring to the reduction in contingent debt work for Ms Miller. That evidence makes it clear that, as at or just before 5 May, *the Employee's position of employment could be affected by redundancy or could be made redundant*. 5 May should have marked the starting point for consultation *regarding the possibility of redundancy* in terms of the employment agreement. Instead, RML proposed and Ms Miller agreed to being reallocated to the call centre subject to a review.

[36] The changes that Ms Miller agreed to on 5 May included her reallocation *As a short-term measure* to a call centre role with *A review of this new direction ...undertaken by 30 June 2008 ...*. Having reached agreement with Ms Miller about her reallocation pending a review by 30 June, RML almost immediately abandoned that approach in favour of formally initiating consultation over redundancy by giving Ms Miller the memo dated 16 May. This apparent change in tack has not been explained. Certainly there is no evidence to show that RML's circumstances changed so as to require bringing forward the review mentioned in the 5 May memo. Either RML did not mean that Ms Miller had until 30 June in her new call centre role for a review; or RML did mean that but soon after changed its mind. Neither action is what a fair and reasonable employer would have done in the circumstances. To put it positively, a fair and reasonable employer would have allowed Ms Miller until 30 June by which time it would have reviewed the situation as to her future. The review would have included reference to the call centre requirements as promised in the 5 May memo.

[37] As events turned out, RML's failure to carry through with what it said in the 5 May memo made a significant difference. A call centre vacancy arose in early June which would have averted any surplus staffing situation or redundancy.

[38] For this reason I conclude that Ms Miller was unjustifiably dismissed and she has a personal grievance against RML.

### **Remedies**

[39] Ms Miller did not contribute to the situation giving rise to her grievance in any blameworthy way.

[40] I do not accept that Ms Miller lost any remuneration as a result of her grievance. There is no expert or reliable evidence to allow a conclusion that Ms Miller being medically unfit for work (as she must have been on a sickness benefit) was caused by her unjustified dismissal.

[41] There is a claim for \$10,000.00 compensation pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000. Counsel for RML submits that Ms Miller's distress was largely caused by the harassment rather than anything to do with RML. I am also referred to *Finau v Carter Holt Building Supplies* [1993] 2 ERNZ 971. *Finau* is a case of unjustified dismissal for cause. That case in turn applied *NZ Engine Drivers etc IUOW v West Coast AHB* [1990] 1 NZILR 619, a redundancy case.

[42] I accept that a significant part of Ms Miller's evident distress must have been caused by the harassment and there can be no compensation award for that. At the same time, Ms Miller's fragile state made her more susceptible to being upset as a result of RML's unlawful dismissal of her so she is entitled to compensation for those effects.

[43] In the *NZ Engine Drivers* case the employer offered but the employee unreasonably refused what the Court found to be a complete settlement (subject to one reservation not presently relevant) so the Court was not prepared to look passed that offer in assessing remedies for the established grievance. In *Finau*, part of the finding was that the grievant lost remuneration because he refused a reinstatement offer but that is irrelevant here because there is no lost remuneration attributable to the grievance. The Tribunal further found that the grievant was to a very large extent the author of his own misfortune and his late demand for distress compensation was

unreasonable. In both cases it was the unreasonable rejection of complete settlement offers in the circumstances that made the difference.

[44] In the present case, Ms Miller refused the offer of reinstatement for several reasons. She felt unable to go back to work in light of the harassment; it was not a job that she wanted long term; she already felt stressed and humiliated about the redundancy and its handling; and she felt that Mr Brewer was just covering himself by making the offer. The last two reasons in particular indicate some loss of trust in her former employer on Ms Miller's part. That loss is not surprising given the reasons for the finding of unjustified dismissal. Ms Miller correctly perceived that the purported consultation signalled by the 16 May memo was *pro forma* rather than genuine. In light of all that I find that it was not unreasonable for Ms Miller to refuse Mr Brewer's offer of the vacant position in the call centre.

[45] Reviewing the compensable aspects of Ms Miller's proven distress I find that she should receive compensation of \$6,000.00.

### **Summary and costs**

[46] Ms Miller was not unjustifiably disadvantaged but she was unjustifiably dismissed.

[47] Receivables Management (NZ) Limited is to pay Ms Miler compensation of \$6,000.00 pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000.

[48] Both parties have already made submissions on costs. Ms Miller is legally aided to the sum of \$4,948.00. It appears that she will have to repay this amount so Ms Miller's situation is no different from that of any other successful applicant except perhaps to note that her legal costs are probably lower because of legal aid limits.

[49] The Authority's approach must be guided by *PBO Ltd v Da Cruz* [2005] ERNZ 808. Ms Miller has been successful and there is no reason to depart from the usual approach that the successful party is entitled to an award of costs. Counsel for Ms Miller makes several criticisms about the respondent's approach but I do not accept there is any validity to the criticisms. Ms Miller might have partly seen her complaint as one about selection for redundancy but it never got to that point. The respondent is not responsible for that misapprehension. The existence and role of the associated company was there for Ms Miller to inquire into and I do not accept there

was any lack of candour on the respondent's part about this. I view this as a typical case of its type that took about two-thirds of a meeting day where neither party unnecessarily caused any additional costs. An award of \$2,000.00 in costs is appropriate. Receivables Management (NZ) Limited is to pay that sum to Ms Miller.

Philip Cheyne  
Member of the Employment Relations Authority