

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Margot Mortland (Applicant)
AND Mandalay Technologies Pty Ltd (Respondent)
REPRESENTATIVES Michael O'Brien, Counsel for Applicant
Simon Kalinowski, Advocate for Respondent
MEMBER OF AUTHORITY Y S Oldfield
INVESTIGATION MEETING 8 November 2004
SUBMISSIONS 2 February, 14 February 2004
DATE OF DETERMINATION 23 February 2005

DETERMINATION OF THE AUTHORITY AND ORDERS BY CONSENT

Employment Relationship Problem

In March 2004 Ms Mortland was told by the respondent, without notice, that she was redundant. At the time the statement of problem was lodged, she asserted that this was not a genuine redundancy and was not procedurally fair. However, during the course of the investigation meeting, after hearing the respondent's evidence about what took place in the period after her employment was terminated, she withdrew the claim that the redundancy was not genuine.

She is now claiming the following remedies:

- Outstanding holiday pay;
- One month's pay in lieu of notice;
- Compensation for loss of benefit being loss of the bonus she would have expected to get but for the redundancy;
- Compensation for hurt and humiliation arising out of the poor handling of the termination of her employment;
- Expenses relating to the use of her home office for the respondent's business.

Also at the investigation meeting, Mr Kalinowski acknowledged that the respondent had failed to comply with the requirements of procedural fairness in relation to the termination of Ms Mortland's employment. Specifically, it had failed to consult with her, failed to give her an opportunity to seek

representation, and it had failed to give notice of the termination. In addition, it had failed to pay her the balance of holiday pay owed to her.

Despite the fact that significant concessions had been made by both sides, the parties advised that they wished the Authority to proceed to determine the matter and resolve some questions regarding remedies which remained at issue between them. I now proceed to do so.

Chronology of Events

1. The respondent is a small company based in Brisbane. In late 2003 it had limited business in NZ which it managed from Brisbane. However it was looking to grow the NZ operations and decided that it needed a local presence for this.
2. Ms Mortland was employed on October 31 2003 as the company's NZ business development manager. Her letter of appointment serves as the record of her terms and conditions. She was to be paid a salary of \$8,000.00 per month. The letter records that she was to invoice the company for her salary, "until we get correct company and tax structures set up in New Zealand." However, it is common ground that both parties intended the longer term relationship to be one of employment, and for this reason, the respondent has submitted to the jurisdiction of the Employment Relations Authority.
3. In her invoices to the respondent the applicant charged GST on her services. She duly paid this to the Inland Revenue Department (IRD.) IRD have now refunded this money. It is not in dispute that the applicant owes this money to the respondent.
4. It was envisaged that Ms Mortland would work from her home and would be the company's sole member of staff until such time as sales grew to a level which would support additional staff. She reported to the respondent's Sales Manager in Brisbane.
5. Over December and January 2004 the respondent's directors developed concerns about its financial position and in discussions with the company's accountant concluded that it was essential to reduce expenses. In February 2003 a business analyst spent a week looking at the New Zealand operation which at this stage had yet to generate any significant revenue. His report on expected sales in this market was not favourable.
6. Mr Kalinowski discussed the situation with Sales Manager, Simon Sandral and decided to close down the NZ operation. He left this to Mr Sandral to carry out.
7. On 5 March Mr Kalinowski's PA confirmed to Ms Mortland that Mr Sandral was on his way to NZ to meet with her. Ms Mortland understood this to be a routine review meeting.
8. Mr Sandral arrived at Ms Mortland's home office, as planned, at 10.00am on 9 March 2004. Ms Mortland began to brief him on progress with potential clients however he intervened. According to her evidence he bluntly told her that he was there to close the office and terminate her employment that day. He told her that the company intended to focus on the Australian market and that it was prepared to give her two weeks notice.
9. Ms Mortland expressed a wish to take legal advice. She also requested to purchase the mobile phone and ADLS router that she had been using. This was agreed. (Later, a price for these items was agreed at \$300.00. It is not in dispute that the applicant owes this sum to the respondent.) Finally, Ms Mortland called the trustee of the trust that owned the house from which the home office was operated and asked her to join the meeting. This was so that

outstanding expenses of the home office (rental) could be discussed. The trustee, Ms Chisholm, arrived soon after however the rental could not be agreed.

10. Ms Mortland was also concerned that she had a number of appointments with clients over the next few days. Mr Sandral advised that he would contact clients and prospects to reschedule/cancel meetings and advise existing clients of the office closure.

11. Later that week, Ms Mortland took the precaution of telephoning a client with whom she had an appointment and learnt that the client had not heard from the respondent. Another client forwarded to her an email it had received from the respondent about the changes to the NZ operation. Ms Mortland was concerned about the working of this email as in her view it did not make it clear that she had been made redundant for cost-cutting reasons. She was concerned that those to whom it had been sent might draw an inference from it that was damaging to her reputation.

12. Ms Mortland told me:

“Although I had adopted a pragmatic, professional attitude during the meeting with Simon, I was in a state of malaise for approximately 4-6 weeks afterwards. I was upset that my reputation had been affected by the company’s actions in dismissing me so bluntly. I had used a lot of my personal and business contacts to gain entry with the various companies. I had done a lot of ground work with companies and began to build relationships. I was embarrassed that the company’s decision to pull out of the New Zealand market would reflect badly on me and my sense of judgement.”

13. On 11 March, after taking legal advice, Ms Mortland wrote to the respondent advising what she considered a reasonable exit package to be. The respondent rejected her proposal. On the basis that agreement could not be reached in relation to the exit arrangements, the respondent decided against paying anything at all until the matter proceeded through legal channels. At the time of the Authority’s investigation meeting, notice and holiday pay remained outstanding. It is not in dispute that Ms Mortland was entitled to four weeks holiday per annum and took only five days leave in total.

14. During her time with the respondent, Ms Mortland laid considerable groundwork with two potential clients. Later, after she had been dismissed, the respondent closed sales with these clients. Ms Mortland’s terms of employment would have entitled her to bonuses in relation to these sales. She claims that this bonus amounts to a future benefit which she has lost as a result of being dismissed.

Determination and orders by consent

15. The parties have been able to agree on two of the remedies sought, being notice and holiday pay. **I therefore record as orders by consent that the respondent is to pay the following sums to the applicant:**

- **One month’s notice of \$8,000.00;**
- **Holiday pay of \$668.00.**

16. The next claim is for loss of a benefit (the opportunity to earn bonuses) which Ms Mortland might reasonably have expected to obtain if the personal grievance had not arisen. The respondent has told me that total bonus payable on sales closed after Ms Mortland’s employment was terminated amounted to \$1840.00AUD. Mr Kalinowski estimated that before her employment ended she completed 20% of the work involved in gaining those sales.

17. If Ms Mortland had been able to work out her notice, she would have had the opportunity to attempt to close these sales and the potential to earn her commission before she left the respondent's employ. She was deprived of that opportunity in a way that cannot be justified and for this reason she is entitled to a remedy. However, she is not entitled to the full amount of the commission itself. Compensation for loss of a chance is a fundamentally different remedy from an award for arrears of wages and may not always be capable of precise quantification. In the event, someone else did the work involved in closing the sales, and it cannot be known whether Ms Mortland would have had the same success if she had had the opportunity to attempt the same.
18. Taking all factors into consideration, **I order the respondent to pay to the applicant the sum of \$500.00 compensation pursuant to s.123 (c) (ii) for loss of this benefit.**
19. Under the separate head of compensation for the distress caused by the poor handling of the termination Mr O'Brien has claimed \$15,000.00. However, I do not consider the facts of this case warrant an award of this magnitude. Although the distress experienced by Ms Mortland must not be minimised, it is my view that there is nothing in this case to mark it out from other cases in which genuine redundancies, poorly handled, have caused distress to the redundant person. **I order the respondent to pay to the applicant the sum of \$5,000.00 compensation for hurt and humiliation pursuant to s.123(c) (i).**
20. The applicant also sought an order for a payment to a third party, being the landlord whose office space she used while engaged in the respondent's business. Ms Mortland does not suggest that this is a claim for reimbursement as she did not take it upon herself to meet the cost out of her own pocket.
21. This claim appeared to me a novel proposal. I asked Counsel for submissions on the question whether I had jurisdiction to make orders for the benefit of a third party in this way. I received none. **I am not satisfied that I can make an order of the sort requested. It is declined.**
22. The parties have also agreed that monies the applicant owes to the respondent are to be offset against the totals to be paid by the respondent. At the investigation meeting the parties agreed that the router and the mobile phone had a combined value of \$300.00AUD. However there remained an issue regarding the quantum of the GST. The applicant has produced evidence to show that she owes GST of \$2,228.00. In the absence of any clear evidence to the contrary I have accepted this as the correct figure.
23. **I record therefore as a further order by consent that the orders made here to the benefit of the applicant are to be offset by sums to the value of \$2,228.00 and \$300.00AUD.**

Summary of orders:

24. The respondent is ordered to pay the applicant the following:
- **One month's notice of \$8,000.00;**
 - **Holiday pay of \$668.00;**
 - **Compensation of \$500.00 pursuant to s.123(c)(ii);**
 - **Compensation of \$5,000.00 pursuant to s.123(c) (i).**

25. However, these orders are to be offset by sums to the value of \$300.00AUD and \$2,228.00.

Costs

26. The parties are invited to attempt to resolve this issue however if they cannot do so they may request the Authority to determine the matter of costs.

Y S Oldfield
Member of Employment Relations Authority