

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Janice Palmer (Applicant)
AND RNJ's Limited (Respondent)
REPRESENTATIVES Janice Palmer in person
Russell Mathers for Respondent
MEMBER OF AUTHORITY Vicki Campbell
INVESTIGATION MEETING 6 November 2006
DATE OF DETERMINATION 8 November 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Janice Palmer claims she was unjustifiably dismissed on 12 April 2006. RNJ's Limited (RNJ) says that Ms Palmer was dismissed for reasons of redundancy and that the dismissal was justified.

[2] The issues for this determination are whether:

- The redundancy was genuine; and
- The process followed by the respondent was fair and reasonable, and met the requirements of the Employment Relations Act 2000.

Was the redundancy genuine?

[3] The Court of Appeal in *GN Hale & Son Ltd v Wellington Caretakers IUOW* [1991] 1 NZLR 151, cemented an employer's right to:

...make his business more efficient, as for example by automation, abandonment or unprofitable activities, re-organisation or other cost-saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have the right to continued employment if the business could be run more efficiently without him. [my emphasis]

[4] Genuineness is considered by the Court in relation to whether or not the redundancy was the actual reason for dismissal rather than being a sham (see *Staykov v Cap Gemini Ernst & Young NZ Ltd*, unreported, Travis J, AC 18/05, 20 April 2005).

Ms Palmer's employment

[5] RJN's was a new business which operated a franchised gelato shop. It commenced trading on 4 January 2006. Mr Russell Mathers was its owner and Ms Palmer was employed as the shop manager on 4 January 2006. The Gelato is made fresh daily on site. Employees, including Ms Palmer, are required to make product while at the same time, serve customers.

[6] When the shop opened in January, Taupo was experiencing a boom in trading, as it was summer vacation time. By March the business began experiencing a downturn.

[7] Mr Mathers and Ms Palmer discussed the reduction in trading. Ms Palmer took steps to assist with the cost of overheads and reduced the working hours of the part time staff, however, Mr Mathers did not accept that the reductions were enough. Ms Palmer told Mr Mathers that she had done all she could with the rosters and that she simply couldn't reduce the hours any further.

[8] A number of initiatives had been undertaken by both Ms Palmer and Mr Mathers in order to increase the take up of the business but unfortunately nothing seemed to be working. Brochures were completed in early to mid March which were deposited around Taupo.

[9] Mr Mathers said that towards the end of March he felt the turnover was not sustainable.

[10] Mr Mathers provided me with a statement of financial performance for RJN's for the period January to March 2006 and for the period April to 30 September 2006. Those figures indicate that the income for the shop was significantly lower for the six month period compared to the first three month period of 2006. It is also significant that the wages bill for the entire six month period was just over \$3,000 more than the entire wages bill for the three month period January – March.

[11] Pursuant to s103A of the Act, I am satisfied that a fair and reasonable employer would have concluded in all the circumstances then confronting RNJ's, in mid to late March 2006, that more efficient use of the labour hours was not only appropriate, but necessary. I am satisfied that a fair and reasonable employer in all the circumstances at that time, and following consultation with Ms Palmer, would have concluded that it was necessary to disestablish the Manager's, 40 hour a week position to be replaced with a position which required lesser hours and for the shop to be run at all times with only one employee.

[12] It is the other statutory consideration under s103A (“...how the employer acted...”) and whether a fair and reasonable employer would have so acted in all the circumstances at the time of dismissal or disadvantage action in employment, that provides difficulty for RNJ’s in this matter.

Consultation

[13] In determining the fairness and reasonableness of the events leading to and of Ms Palmer’s dismissal itself I must consider the written individual employment agreement between the parties. Clause 6 (Termination) provides for a period of notice of one week. Clause 7 address redundancy expressly and requires the employer to follow a fair procedure and for consultation including the exploration of alternative options, before termination by reason of redundancy.

[14] Section 4(1A) of the Employment Relations Act makes it clear that an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of one or more of its employees, to provide to the employees effective access to information and an opportunity to comment before such decisions are made. As the recent judgment of *Simpsons Farms Ltd v. Aberhart* (unreported, Coglán CJ, AC52/06, 14 September 2006), makes clear, this means that consultation is necessary in any redundancy situation.

[15] Section 4(1A) requires the parties to employment relationships to be “...active and constructive in establishing and maintaining a productive employment relationship...” in which they are, among other things, responsive and communicative.

[2] In *Communication & Energy Workers Union Inc v Telecom NZ Ltd* [1993] 2 ERNZ 429, the Court discussed the meaning of “consultation” in the context of redundancy, and listed a series of propositions extracted from the Court of Appeal’s decision in *Wellington International Airport Ltd v Air NZ* [1993] 1 NZLR 671 (CA). In particular, the Court noted:

- (a) Consultation requires more than mere prior notification and must be allowed sufficient time. It is to be a reality, not a charade. Consultation is never to be treated perfunctorily or as a mere formality.
- (b) If consultation must precede change, a proposal must not be acted on until after consultation. Employees must know what is proposed before they can be expected to give their view.
- (c) Sufficiently precise information must be given to enable the employees to state a view, together with a reasonable opportunity to do so. This may include an opportunity to state views in writing or orally.
- (d) Genuine efforts must be made to accommodate the views of the employees. It follows from consultation that there should be a tendency to at least seek consensus. Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done.
- (e) The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.

1 April Letter

[16] On 1 April Mr Mathers gave Ms Palmer a letter which read as follows:

Notice of Reduced Hours

Through the winter months it has become apparent that the hours in your Employment Contract are not viable for the company to maintain and some solo work will be required.

The options are limited and we will do our best to maintain the maximum hours possible but the contract needs to be amended by the attachment of this notice if you accept.

If you find the reduced hours unacceptable then we will have to interpret this notice as one of redundancy and accept that a person employed in the same position will accept lesser hours.

We would prefer your continued employment but acknowledge that your needs may be more than we are able to provide.

If you are able to continue under this change please sign the area provided and return one copy.

[17] Mr Mathers accepted at the investigation meeting that the letter he gave Ms Palmer two options:

- Accept the reduction in her hours of work; or
- Be made redundant.

[18] Mr Mathers told me that during his discussions with Ms Palmer prior to 1 April, she had made it clear that she did not want to work in the shop on her own. He said they discussed it on a number of occasions but each discussion became more tense. He said that she preferred to have company while she was working in the shop.

[19] Ms Palmer says she was in fact already working four hours on her own in the shop. She told me that her reluctance to work on her own in the shop arose as a result of not being able to visit the ablutions as necessary as you had to physically close the shop to go to use the facilities because they were off site. It was common ground that Mr Mathers had advised staff that he had no problem with the shop being closed in order to allow somebody to take a break or go to the toilet.

[20] Ms Palmer was also concerned that if she was to work in the shop on her own it would mean that she would end up working a 40 hour week without any breaks at all from the shop. Ms Palmer accepted that she did not raise these issues with Mr Mathers following the receipt of the 1 April letter.

[21] Mr Mathers said that even though it was not mentioned in the 1 April letter, he was prepared to discuss the reduction in hours but he was led to believe by Ms Palmer that the letter had not been opened. It was common ground that there was no discussion after 1 April about the possibility of redundancy nor of any alternatives to redundancy.

[22] I accept that the letter of 1 April 2006 left Ms Palmer with the impression that she was being advised of the changes to be made rather than consulted about how the company might make further efficiencies. The letter does not identify what specific reductions are necessary nor, what the impact of those reductions would be on Ms Palmers employment. It was Mr

Mathers responsibility to drive the changes he sought in the business and to seek to consult and discuss the options with Ms Palmer (pursuant to both the employment agreement and section 4 of the Act).

[23] Mr Mathers did not attempt to discuss the issues with Ms Palmer because he felt she did not wish to communicate with him.

12 April 2006

[24] It wasn't until 12 April that Mr Mathers approached Ms Palmer about the matter. By that time emotions were running high. The discussion ended with Ms Palmer's dismissal for reasons of redundancy.

[25] Mr Mathers wrote to Ms Palmer confirming her dismissal in the following terms:

Further to our discussion this morning 8.40am I confirm the termination of your employment. In the face of economic needs you have shown little interest in attempts to rectify and assist the situation (labour is part of this) and you have been kept updated. You have passed the roster make up to myself and then complained even though the roster accommodates the days off you requested. I also find your mood swings difficult and unnecessary to deal with and not what I would expect from a person in a managing position. There has been little effort on your part to expand the client base. Our Reduced Hours/Redundancy Notice of the first of April 06 still remains unopened and your explanation is "I am showing it the contempt it deserves". We have little option than to action that notice and confirm that your employment will cease with us at the completion of this weeks roster. Payment of your final was will be made when all property owned by RNJ's is returned including that of your daughter Abbey as I don't see her as being available in the future which is understandable.

[26] Mr Mathers also told me that he wasn't happy with Ms Palmer as an employee. He hoped that she would take up the reduced hours. However, there was no information from Mr Mathers as to the extent he required Ms Palmer to reduce her hours of work. There was nothing contained in the letter of 1 April 2006 which spelt this out for her. In answer to my questions at the investigation meeting Mr Mathers conceded that he had never at any stage discussed with Ms Palmer alternatives to her being made redundant. Mr Mathers said that Ms Palmer had made it clear that she wanted to work 40 hours per week.

[27] It was common ground that Mr Mathers did not discuss alternative options to redundancy and did not provide further information regarding the actual reductions required to be achieved from Ms Palmer's position or give her the opportunity to discuss the reductions. These failures breached the requirements of Ms Palmer's employment agreement and s4 of the Act. It follows that Ms Palmer was unjustifiably disadvantaged in her employment.

[28] Ms Palmer has a personal grievance for which remedies are available.

Remedies

[29] In accordance with *Simpsons Farms*, this was a genuine redundancy. The business was experiencing a real and significant downturn. Therefore it can not be said to have been an unjustifiable dismissal. It follows that ongoing lost wages can not be claimed. Nor can Mrs Palmer be compensated for the loss of her job, but rather for the failure to consult with her.

[30] There was very little evidence from Ms Palmer as to the impact the redundancy had on her. After 1 April the professional relationship between Mr Mathers and his manager disintegrated. He felt he could not talk to her, and Ms Palmer was upset with the letter and the requirement to reduce her hours and did not take any opportunity, herself, to discuss the issues with Mr Mathers. However, that is not conduct that contributed to her personal grievance. The disadvantage grievance was brought about by RNJ's acts and omissions. Taking all relevant factors into consideration I set the level of compensation at \$2,500.

RNJ's Limited is ordered to pay to Ms Palmer, \$2,500 compensation pursuant to s123(1)(c) within 28 days of the date of this determination.

[31] Neither party was represented at the investigation meeting. However, the correspondence on the Authority file indicates that Ms Palmer had received legal advice in the early stages of her claim to the Authority. In that case, costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined

Vicki Campbell
Member of Employment Relations Authority