

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Joan Saywell (Applicant)
AND New Zealand Management Academies Limited (Respondent)
REPRESENTATIVES Prue Dawson for Applicant
Kevin Thompson for Respondent
MEMBER OF AUTHORITY Vicki Campbell
DATE OF DETERMINATION 27 April 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Joan Saywell commenced employment with Tricia's Academy in January 1999. On 1 July 2002 New Zealand Management Academies Limited (NZMA) purchased the business and at this time Ms Saywell continued to be employed as the Manager – Hamilton Academy, for the new owner. NZMA also operates training and education academies at Otahuhu and Henderson.

[2] In January 2006 Ms Saywell was dismissed by reason of redundancy. Ms Saywell claims that dismissal is unjustified. She claims the redundancy was a sham, the process of recruitment for the new position of Academy Manager was predetermined, the respondent engaged in misleading conduct, the respondent breached its obligations under section 4 of the Employment Relations Act 2000, and the consultation process was fundamentally flawed and not implemented in a fair and sensitive way.

[3] In the alternative Ms Saywell claims she was unjustifiably disadvantaged due to the respondent's flawed process and failure to implement the redundancy in a fair and sensitive way.

[4] New Zealand Management Academies Limited ("NZMA") says the restructuring was genuine and Ms Saywell's dismissal justified. It denies any breaches of the ERA.

[5] I am required to scrutinise NZMA's actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[6] The test of justification does not change the long-standing principles about justification for redundancy. An employer must act genuinely and not out of ulterior motives. Business decisions about the number of positions required in an organisation are for the employer to make and not the Authority (see *Simpson Farms v Aberhart*, unreported, Employment Court, Colgan CJ, AC52/06, 14 September 2006).

Background

[7] In August 2004 NZMA restructured its business and made a number of employees redundant. One of the employees made redundant in 2004 challenged the redundancy in the Employment Relations Authority, *Geraldine Hitchiner v New Zealand Management Academies Limited*, unreported, AA16/06, 27 January 2006. The result of that case was a finding against NZMA. Ms Saywell was present at the investigation meeting for Ms Hitchiner's case and gave evidence in support of the applicant.

[8] In August 2005, Ms Beverley Cullen commenced employment as the Director of HR and Organisational Development. In September 2005, after she had met with all the Academy Managers and spent time familiarising herself with the business, Ms Cullen embarked on an exercise to develop and implement key performance indicators (KPI's) for each of the Academy Managers. There was no dispute at the investigation meeting that the Academies were not performing to expectations. The introduction of KPI's was seen as a way of raising the level of performance of all academy managers. However, after consulting with managers over the proposal, and because of the general resistance to their introduction, NZMA decided not to continue with the KPI's but instead to look at the overall structures within the business.

[9] During September, October and November 2005, Mr Bruce Knox, Ms Saywell's immediate manager, began a process of addressing, what he considered to be issues relating to Ms Saywell's communication skills. Several letters were written to Ms Saywell setting out the respondent's concerns and meetings were held at which time Ms Saywell was provided an opportunity to present explanations to the concerns raised. As a result of the meetings, Ms Saywell was required to demonstrate improvements in her communication skills. After each meeting Ms Saywell was advised that if improvements were not made a disciplinary process may be implemented. As events transpired no disciplinary action eventuated.

[10] Ms Saywell says she was feeling very anxious about the tone and frequency of the correspondence she was receiving from Mr Knox and raised this directly with the managing director of NZMA, Mr Tim Cullinane. In her letter to Mr Cullinane, Ms Saywell expressed her

concern that Mr Knox was trying to force her out of her job. Mr Cullinane replied to Ms Saywell and assured her no one was trying to force her out of her job. He outlined to Ms Saywell his view that Mr Knox was working through a process in an effort to address issues regarding her performance, but offered to meet with her after her meeting with Mr Knox if she was still concerned. Ms Saywell did not take up the offer to meet with Mr Knox.

[11] As stated earlier in this determination, in October 2005, Ms Saywell gave evidence at the Authority's investigation into Ms Hitchiner's claim of unjustified dismissal. On 1 November 2005, Ms Cullen, who was now Ms Saywell's immediate manager, wrote to Ms Saywell outlining concerns she had about the evidence Ms Saywell and others had given at the Authority's investigation meeting.

[12] The issues related to derogatory comments Ms Saywell had made to Ms Hitchiner about Mr Tom O'Conner's abilities as an HR Manager at the time NZMA was looking to reduce the number of tutors in the Hamilton Academy. Ms Cullen also raised issues about the evidence Ms Saywell gave relating to the process of selection of Ms Hitchiner as the redundant employee. The concerns related to differences in evidence presented at the investigation meeting about Ms Hitchiner's skills and abilities, and the information Ms Saywell had provided to Mr O'Connor during the redundancy process.

[13] Ms Cullen also raised concerns that during the investigation meeting, Ms Saywell was not able to recall until prompted, whether a student, who had written a letter of complaint against Ms Hitchiner, had mental health issues. According to her letter, Ms Cullen understood that at the time Ms Saywell had passed the letter of complaint to Mr O'Conner to deal with, she failed to advise Mr O'Conner of the student's mental health issues even though she was aware of them. Other matters relating to Ms Saywell's interactions with staff were also raised by Ms Cullen.

[14] Ms Saywell provided a written explanation to each of the points raised by Ms Cullen and, at the same time, raised concerns about Ms Cullen's agenda. Ms Saywell and Ms Cullen met on 7 November 2005 to discuss the matters raised by Ms Cullen.

[15] It was not until 23 December 2005 that Ms Saywell received a letter confirming the outcome of the investigations into the allegations outlined in Ms Cullen's letter of 1 November. Ms Cullen advised Ms Saywell that while she was satisfied three of the concerns raised with Ms Saywell were valid, no formal disciplinary action would be taken. Ms Cullen concluded by reiterating to Ms Saywell that the outcome should be seen as a signal as to the required performance level of the position of Academy Manager.

Was the dismissal by reason of genuine redundancy?

[16] I am required, pursuant to section 103A, to consider whether the actions of the respondent in restructuring its business were the actions of a fair and reasonable employer, in all the circumstances.

[17] The parties were subject to a collective agreement which provides for redundancy in the following terms:

- a) Redundancy means that the employment of the employee is terminated by the employer if that termination is because the employee has or will become superfluous to the needs of the employer.
- ...
- c) The employer shall not pay redundancy compensation.
- d) The employee shall, where practicable, be given six weeks' notice of termination due to redundancy. This notice shall be inclusive of the notice provided for in clause 17.

[18] Concurrently, with the matters being raised and addressed by Ms Cullen, the management team, including Ms Saywell, attended a meeting in Auckland in November 2005. At that meeting Ms Rosanne Graham, a Strategic Planning Consultant and Mr Jonathan Cullinane facilitated a strategic planning session during which the academy managers worked in groups to undertake a SWOT analysis of NZMA as an organisation.

[19] The session confirmed Mr Tim Cullinane's preliminary view that significant structural change was required to ensure the ongoing success of the organisation. This was not disputed and at the investigation meeting Ms Saywell accepted that the way the business was structured was a barrier to success.

[20] Ms Deborah Batchen, who gave evidence in support of Ms Saywell, told me that not one of the Academies was performing. She told me the Academies were in dire straits and there was a drive by the managers to get more control of their Academies.

[21] Following the November strategic planning session Mr Tim Cullinane drafted a proposal to change the business structure. The proposal was set out in a power point presentation and presented at a meeting of all managers, including Ms Saywell on 5 December 2005.

[22] Mr Tim Cullinane's proposal would establish independent business units for each of the "branch" offices of NZMA. Under the proposed structure Academy Managers would become directly responsible for the development, management, leadership and performance of all aspects of the business unit. At the time the proposal was put to the management team, the Academy Managers were responsible for achieving targets and objectives relating to income and student numbers, but lacked the control over how the marketing was carried out, or responsibility for setting and performance against their budgets.

[23] The managers were asked to consider the information and to give feedback. The managers were advised that draft position descriptions for the extended academy manager roles would be emailed to all managers and that feedback on both the proposal and the job descriptions should be provided by 9 December 2005.

[24] There is no dispute that Ms Saywell saw the change as positive, as she had long wanted to have the ability to manage and control initiatives designed to increase student numbers. Other than that, she believed her role remained unchanged and that she would continue in the new manager's role.

[25] Ms Saywell told me she was quite comfortable with the proposed new structure, but she had concerns about the fact that her current job would be disestablished and that she would have to reapply for the new job. She told me the major difference between her current role and the proposed new role, according to the discussion on 5 December, was the additional control relating to sales, strategic planning, and budgeting. Ms Saywell told me these responsibilities were not contained within the old job description. At the investigation meeting Ms Saywell accepted the new role was a significant change to the role she was undertaking at the time of the restructuring.

[26] Ms Batchen confirmed that a portion of the Academy manager's job was significantly enhanced in that it had expanded. Ms Batchen told me that at the meeting on 5 December there was discussion between the management team as to whether they should change the name of the position given the wider responsibility and autonomy.

[27] Ms Saywell and Ms Batchen say the restructuring process was implemented as a means to get rid of Ms Saywell. In other words, the restructuring was a sham. I do not agree. At the investigation meeting both Ms Saywell and Ms Batchen were in agreement that the organisation was in need of change and that the change was positive. They both accepted that the changes to the Academy Manager's role were significant.

[28] I am satisfied NZMA and its management team (which included Ms Saywell) genuinely believed in the need for change. I am also satisfied that the new, enhanced, role of Academy Manager was significantly different to that performed before the restructuring exercise. NZMA was entitled to raise and work through issues relating to Ms Saywell's performance. That process was commenced prior to the restructuring exercise, in which Ms Saywell fully participated and was completed after Ms Saywell and all other managers were advised their respective positions would be disestablished.

[29] I find the restructuring was for genuine business purposes and that, pursuant to section 103A, a fair and reasonable employer would have concluded, in all the circumstances, that the significantly enhanced role of academy manager was required to ensure the ongoing viability of the business.

[30] I must now turn my mind to the statutory consideration of how the employer acted and whether a fair and reasonable employer would have so acted in all the circumstances at the time of dismissal.

How did the employer act?

[31] Section 4(1A) of the Employment Relations Act requires 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. Consultation is necessary in any redundancy situation (see *Simpsons Farms Ltd v Aberhart*, unreported, Cogan CJ, AC52/06, 14 September 2006).

[32] 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.

[33] 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.

[34] Following the management team meeting on 5 December (at which the proposal for the restructuring was discussed comprehensively), on 8 December 2005, Ms Cullen met with Ms Saywell where the new job description was made available for the first time and discussed fully. At this meeting Ms Saywell was advised that if the proposal was implemented, her

current position would be disestablished and, if she wished, she could apply for a new position. Ms Saywell says that up to and including this meeting, NZMA had not revealed that she could be facing redundancy if she was not successful or did not apply for the new position.

[35] NZMA's Christmas function was held that night, 8 December, which Ms Saywell attended. She returned to her office some time the following day at which time she received an email from Ms Cullen attaching the job description they had discussed the previous day. In her email Ms Cullen says:

As I confirmed, this is a significantly different and bigger role when compared to the current position of Academy Manager – which means that it is a new role. If the proposed structure goes ahead in its current form, with this new position included, then the current position of Academy Manager will be disestablished and the new roles confirmed and recruited.

As I also mentioned, we will be initially recruiting internally for all new positions confirmed within the final new structure. We will extend to include an external recruitment process if we feel we need to due to not having the required skills and competencies internally.

[36] As already set out in this determination, feedback on the proposed new structure and the job descriptions was due that same day, on 9 December 2006. While Ms Saywell did give positive feedback about the new structure, she did not give any feedback on the job description as she had only just received a hard copy of it and had not really had a chance to consider it enough to be able to give constructive feedback.

[37] The decision to implement the proposed restructuring was made during the weekend of 10/11 December. Ms Saywell, together with all other managers, was advised verbally on Monday 12 December that her position as Academy Manager was to be disestablished and the new, more senior role, established. Ms Saywell was invited to apply for the new role.

[38] On 14 December 2005 NZMA confirmed in writing, its previous verbal advice that Ms Saywell's position would be disestablished with effect from 3 February 2006. Ms Saywell says that she was still not aware that if she did not apply for the new position or was unsuccessful in her application, redundancy was a possibility. In answer to questions at the investigation meeting Ms Saywell was unable to explain to me what would happen to her employment if she did not apply for the job. Ms Saywell and Ms Batchen both accepted that other employees (including Ms Batchen), who chose not to apply for the new roles, were made redundant.

[39] Ms Saywell made a formal application for the new manager's role on 19 December and was interviewed on 19 January 2006. In her written evidence Ms Saywell was critical of the interview process saying the interview questions were irrelevant to the position and she felt uncomfortable with the way the interview was being handled. Mrs Saywell says that during the interview process she concluded that a decision had already been made not to appointment her and that the interview was farcical.

[40] However, in answer to questions at the investigation meeting this evidence changed and Ms Saywell reluctantly accepted that the interview was conducted professionally and that the questions were reasonable.

[41] I am satisfied the interview process was structured and formal. Set questions were developed to test each incumbent manager against the new accountabilities set out in the restructured job descriptions. Further, I am satisfied it is more likely than not that no decision had been made about Ms Saywell's future employment at the time she had the interview.

[42] Ms Saywell was unsuccessful in her application and was advised of this on 25 January and given formal notice of redundancy on 26 January. Ms Saywell was asked if she would like to leave on 26 January 2006, however, she chose to leave on 3 February instead, being the date on which her position was formally disestablished. Ms Saywell refused an offer of a leaving function.

[43] On 31 January 2006 Ms Saywell requested and was provided with feedback as to the reasons why she had been unsuccessful in her application for the new role.

[44] Ms Saywell says the process used by NZMA was flawed because she was not advised at any time leading up to 25 January 2006 that she may be made redundant. Ms Cullen maintains that by advising Ms Saywell her current role could be disestablished was enough to put her on notice that she may be made redundant.

[45] I am satisfied that it is more likely than not, Ms Saywell was aware that the disestablishment of her role could result in her being declared redundant. Ms Saywell was a senior manager in NZMA and as such, she had assisted the organisation through a restructuring process in 2004 which resulted in at least one position at the Hamilton Academy being disestablished. The incumbent in that position was made redundant. On 8 December, and after being advised by Ms Cullen that she [Ms Saywell] would have to apply for one of the new positions if the restructuring went ahead, Ms Saywell sought independent legal advice. Further, before Ms Saywell was interviewed for the new role, at least one manager had been given notice of redundancy as a result of the restructuring, when she did not apply for one of the new roles.

[46] Ms Saywell was, I find, under the misapprehension that she would simply be appointed to the new role and that the process of application, interview and appointment to the new roles was a matter of form, not substance and that she would carry on in the new role.

[47] Ms Saywell claims NZMA engaged in misleading conduct and breached its obligations under section 4 of the Act. There is no evidence to support these claims by Ms Saywell. I am satisfied Ms Saywell was fully conversant with the reasons for the restructuring, and how the role of academy manager would be impacted on by the restructuring. Ms Saywell was also aware that should internal applications not result in an appointment, external applicants would be sought.

[48] I have given consideration to the short period of time between discussions around the new job description and the decision made to implement the new jobs as set out in those job descriptions. Ms Saywell did not have any opportunity to provide feedback on those written documents, however, I am satisfied that the content of those documents was in line with the information provided by Mr Tim Cullinane on 5 December 2005 and reflected Ms Saywell's understanding of the enhanced new role for academy managers. The evidence shows that Ms Saywell was enthusiastic about those changes and the added responsibility the new roles would give to the incumbents.

Separating out NZMA's actions against the statutory objective standard of the actions of a fair and reasonable employer and how a fair and reasonable employer would have acted in these circumstances, I find NZMA's actions were what a fair and reasonable employer would have done. Ms Saywell's dismissal for redundancy is justified. I can be of no further assistance to her.

Costs

[49] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the parties may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority