

[3] On 19 November 2008 the respondent provided a brief of evidence from Mr Ralph Leaney, a director of the company. Both the respondent and the Authority assumed that the document titled “*statement in reply to respondent’s statement in reply*” was the applicant’s brief of evidence.

[4] At the end of the hearing I was asked by the applicant when I was going to consider her evidence. Ms Schmidt then produced a number of pages which she said she had forwarded to her lawyer, Ms Cole. Ms Cole could not remember having received these documents from the applicant or whether she had forwarded them to the Authority. Neither the Authority nor the respondent had received this brief of evidence. It was necessary at that stage to take a break in the proceedings so that the respondent and I could consider the additional material supplied by the applicant.

Background

[5] Ms Schmidt commenced employed in March 1999 in an office administration role. She was one of two office staff employed by the respondent. The other office employee, Annie, commenced employment in 1996 and was the company’s accounts person. Ms Schmidt worked from 8am to 4.30pm and her duties included answering the telephone, managing the facsimile and email communication, general typing, attending to inward and outward mail, processing daily time sheets and data entry. She was also responsible for the administration work such as maintaining the office job book and would assist with clerical duties as necessary.

[6] Webster Group is an electrical engineer contractor who specialises in supplying and repairing marine and land based electrical and electronic equipment. The primary focus of the business is the supply and maintenance of generators, transformers and auxiliary equipment, although they provide a range of other services such as marine electrical services, industrial services, electrical services and electronic repairs and maintenance. The main office is based on Auckland’s North Shore; there is a depot at Tauranga with one part time employee and a Christchurch branch.

[7] Mr Leaney said that up until 2007 the main income stream was from Toll Rail. As this was a large contract and the company’s main revenue source the business had evolved with that contract. Unfortunately the company’s business declined progressively from late 2005. They lost several major contracts which he itemised.

[8] In September 2007, Mr Leaney met with Ms Schmidt and Annie. Both employees were well aware of the financial situation as they were fielding calls from creditors about unpaid invoices. They were on stop credit with a number of suppliers. Ms Schmidt had discussed with Mr Leaney the incoming calls she was fielding from irate creditors on the main reception line. Mr Leaney said he discussed the lack of new business, lack of phone calls and how that was impacting on the business and what actions they needed to take immediately and also, if the financial situation did not improve, what that might mean for the future.

[9] As an immediate action they talked about Ms Schmidt and Annie having their holidays while it was quiet. Mr Leaney remembered Ms Schmidt saying she had discussed the situation with her husband. Mr Leaney also talked about perhaps reducing hours if there was not a lot of administration work, due to there being no new business and he highlighted that while he was only suggesting that at that stage, it was a very real possibility that in the future it would be necessary to make some drastic changes. He said Ms Schmidt acknowledged the lack of new business and phone calls.

[10] In October 2007 there were no signs of improvement in the company's financial position. It became necessary to put more staff on part time work to be able to cope. Three people went from full time to part time and four people were not replaced when they left.

[11] Mr Leaney had a second meeting with Ms Schmidt and Annie in October. At that meeting he formally told them of the staff reductions they were making to keep the business going. He told them to keep an eye out for other work as he would rather they left to go to another job. Ms Schmidt had acknowledged that she had very little to do on a day to day basis and asked whether she should go then, to which Mr Leaney said no, they were trying to trade their way out of difficulty. Ms Schmidt does not recall that conversation.

[12] Mr Leaney also suggested to Ms Schmidt that if she wanted she could have a representative come in and discuss the situation. At the time she declined that offer but later went back to him and said she would take it up if it became necessary.

Loss of Toll Contract

[13] On 15 November 2007 Webster Group received notice from Toll Rail that it no longer required Webster Group's services and would be terminating the leasing arrangements immediately. That contract was worth approximately half a million in hire revenue per year.

[14] The directors had a meeting after the receipt of the letter from Toll Rail and then called a meeting with Ms Schmidt and Annie to notify them of the loss of the contract and the impact on the business. Mr Leaney handed out copies of the letter from Toll and asked everyone to read it. He then reiterated what he had said at the earlier meetings about the financial situation not being good and that that latest news had dire consequences. He said that as a consequence of the loss of the contract the business now had negative income and it meant that further reductions in expenditure had to be made and it was likely the company would need to downsize even further.

[15] He discussed with Ms Schmidt and Annie that because the business had not improved the administrative team would be affected. He explained that the directors had held a crisis meeting and were very sorry but they were going to need to make changes to the admin team and it was most likely Ms Schmidt's position that would be affected. He said the company would need to take immediate action because of the financial position and they may need to reduce her hours or disestablish her role altogether.

[16] He did tell Ms Schmidt what would happen if she was made redundant. He told her that the company would offer her one month's redundancy payment and they would help her find another job or perhaps they could look at her taking on a more casual role, calling her as needed. Mr Leaney is adamant that they had not made a decision at that point and he was very careful to point that out to Ms Schmidt. He was just informing her of the position, of the need to act quickly, and what would happen if redundancy eventuated. He expected they would talk about the options with Ms Schmidt and her representative at another meeting, either later that day or the following day. Mr Leaney said he thought they could work out a solution that at least everyone was comfortable with even if not happy.

[17] He told Ms Schmidt that she should go and talk to her representative. She had told him months earlier that she had one when they discussed the possibility of

looking at the accounts. He offered Ms Schmidt the opportunity to arrange legal representation and meet with the directors to discuss the situation, possible consequences and the company's proposal that the administrative team be reduced. He is adamant that he did not tell Ms Schmidt that she had lost her job. He told her that her representative could look at the books.

[18] Ms Schmidt says she was told that the directors were unsure about things but they would probably have to reduce staff and that Mr Leaney said he no longer had a job for her. She said she was not given the option for part time work. Mr Leaney said Ms Schmidt left the meeting and went to her work station. He thought she was phoning her representative which was consistent with the discussion and they could hear her through the wall using the phone. He said they all waited for sometime as they expected her to come back to the meeting with a time that her representative could meet with them. She did not return to the meeting.

[19] He then suggested that Annie go and look for her in case Ms Schmidt was too upset to return to the meeting. Annie came back and said Ms Schmidt was packing up her personal items. It appears that Ms Schmidt had also gone into the lunch room and told other staff members that she had been sacked and she then left the building.

Subsequent Events

[20] Ms Schmidt did not return to work on 19 November. Mr Leaney said he was surprised about that but thought perhaps she needed a little time. He then received a letter from her representative on 20 November 2007. That letter said that Ms Cole had been consulted by Ms Schmidt in respect to termination of her employment. Ms Cole considered that the termination was without substantive reason and was carried out in a procedurally unfair manner.

[21] Mr Leaney said he was surprised at this. He telephoned Ms Cole and said he was shocked and where to from here. He spoke to Ms Cole a couple of times and she told him she would try and contact Ms Schmidt to ascertain whether she was going back to work. She thought Ms Schmidt was on holiday.

[22] He replied to Ms Cole's letter on 22 November and said that the company had not terminated Ms Schmidt's employment and requested confirmation of whether she would be returning to work. He noted that at the meeting on 16 November Ms Schmidt was advised that she was free to seek the services of a representative or

bring a support person to meet with the directors of the company regarding the prospect of her redundancy. Ms Schmidt had indicated she would take up the offer to have someone represent her and she left the meeting and returned to her work station.

[23] Mr Leaney wrote:

However your correspondence implies (together with the fact that Linda has not returned to work) that Linda either considers her employment has been terminated (which is not the case) or that she has resigned from her employment. Accordingly, please urgently confirm the status of Linda's employment.

[24] Mr Leaney did not receive a response to that letter. The next contact was a call from the Mediation Service rang asking whether he would be available to attend a mediation.

[25] Ms Schmidt was not sure when the letter from the company dated 22 November had been passed on to her by Ms Cole, but, clearly it was not passed on with alacrity. This was very unfortunate.

[26] Mr Leaney said that in December they paid Ms Schmidt her final pay including one month's notice because she was clearly not returning to work.

[27] Mr Leaney said that Ms Schmidt knew the financial stress the company was under. They had talked about that and the possible consequences on several occasions. He tried to give her as much information as possible and offered for her to have representative come in to look at the books if she wanted. The meeting on 16 November was to tell her about what they thought would need to happen. He expected her to arrange a time with her representative to talk about the situation.

[28] The company had taken on a part time office person, who undertook similar tasks to those that had been carried out by Ms Schmidt in about March 2008.

Decision

[29] There is no evidence that the redundancy was anything other than substantively justified. It is very unfortunate that Ms Schmidt decided not to contact her representative and involve her in a meeting, prior to her representative writing the letter saying that the employment had been terminated. Ms Schmidt pre-empted the consultation process by leaving her employment and not returning to it. From the

evidence I heard it was highly likely that had there been a follow up meeting the company would have been able to offer Ms Schmidt part-time employment, which Ms Schimidt told me she would have been very happy to have accepted.

[30] Ms Schmidt was not unjustifiably dismissed and does not have a personal grievance.

Costs

[31] Costs are reserved. If the parties are unable to resolve the issue of costs the respondent should file a memorandum within 28 days of the date of this determination. The applicant should then file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King
Member of the Employment Relations Authority