

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 36  
3018094

BETWEEN DONNA STEMMER  
Applicant  
AND VAN DEN BRINK POULTRY  
LIMITED  
Respondent

Member of Authority: T G Tetitaha  
Representatives: D Erickson, Counsel for the Applicant  
M McGoldrick, Counsel for the Respondent  
Investigation Meeting: 10 November 2017  
Submissions received: 14 November 2017  
Date of Determination: 2 February 2018

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**DETERMINATION OF THE AUTHORITY**

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- A. Dr Stemmer was unjustifiably dismissed because Van Den Brink Poultry Limited failed to advise her redeployment was not an option prior to her dismissal for redundancy.**
- B. I decline to award any lost income or benefits.**
- C. Van Den Brink Poultry Limited is ordered to pay Dr Stemmer \$15,000 compensation pursuant to s123(c)(i) and 124 of the Employment Relations Act 2000.**
- D. Dr Stemmer is ordered to pay a penalty of \$5,000 to Van Den Brink Poultry Limited pursuant to s4A Employment Relations Act 2000.**
- E. Costs are reserved.**

## **Employment Relationship Problem**

[1] Dr Donna Stemmer alleges she was unjustifiably disadvantaged and/or dismissed for redundancy by Van Den Brink Poultry Limited.

### **Relevant Facts**

[2] Van Den Brink Poultry Limited (VDB) is in the business of processing poultry products. It owns five processing plants throughout New Zealand. In 2014 VDB made a decision to commission a specific plant at Mt Wellington for secondary processing and transfer those functions from its Tuakau and Karaka plants. The purpose was to reduce processing costs by introducing more automation. The Mt Wellington plant opened on 18 January 2016.

[3] VDB have 188 Unionised employees on collective agreements. At the time there was a need for advice around the transition of those workers from the Tuakau and Karaka sites to Mt Wellington. Bargaining for new collective agreements was also occurring. Michael Sheridan, Chief Financial Officer (CFO) identified Dr Stemmer as a possible resource to assist with these issues.

[4] Dr Stemmer was employed on 10 February 2016 initially on a two month fixed term contract as a Business Process Manager. Her employment was extended to a further three month fixed term contract. She was then offered and accepted a permanent position as Human Resources Manager on 9 July 2016. She initially reported to another person but this changed in April 2017 to Mr Sheridan. Her salary was \$165,000 per annum plus a motor vehicle.

### **Redundancy**

[5] On 1 May 2017 Dr Stemmer was approached by Mr Sheridan. She was handed a letter of the same date that contained a proposal to disestablish her position and create a Human Resource Advisor position at \$100,000 pa. In summary the reasons for her redundancy were:

- a) VDB had completed the required business restructuring;
- b) Level of strategic HR support had reduced considerably;

- c) A large body of work had been completed on the collective employment agreements (CEA);
- d) Reduced requirement for an experienced HR Manager to interpret CEA because CFO and Operations Manager were involved; and
- e) Saved \$65,000 per annum by replacing her position with an HR advisor at \$100,000 pa.

[6] There is some dispute about various conversations Dr Stemmer had Mr Sheridan on 1 May 2017 and earlier.

[7] Dr Stemmer prepared detailed written feedback on 18 May 2017. She also met with the CEO to discuss the proposal. There is some dispute about what she was told by the CEO.

[8] On 22 May 2017 she received a two page written response from Mr Sheridan. He sought a further meeting.

[9] Dr Stemmer requested a face to face meeting with Mr Sheridan, the CEO and a co-worker GL. This was declined because on the basis she had already met with CEO and it was seen as inappropriate to involve a co-worker.

### **Travel to Bermuda**

[10] That same day Dr Stemmer began suffering dizzy spells. She saw her doctor whom prescribed anti-depressants but did not make any formal diagnosis. She was granted and paid discretionary leave because she had no entitlement to sick leave.

[11] Between 22 May and 14 June 2017 she travelled to Bermuda to attend the Americas Cup event. She did not inform her employer of this prior to her redundancy.

### **Termination**

[12] Dr Stemmer returned to work on 14 June 2017. A final meeting was arranged with Mr Sheridan. This was brief. She raised a concern about a rumour she had been exited due to an investigation she held into alleged bullying by a Manager. Mr Sheridan offered to follow this up but did not report back to her. Mr Sheridan confirmed he had considered her feedback and addressed her issues.

[13] Dr Stemmer's employment was informed she had been terminated by way of redundancy on 15 June 2017.

### **Issues**

[14] By consent the issues for hearing are:

- (a) Whether the reasons for Dr Stemmer's redundancy genuine;
- (b) Whether the process leading to redundancy was fair and reasonable including:
  - (i) whether there was an improper motive to disestablish her position due to Dr Stemmer's and GL's influence over the business;
  - (ii) whether there was inadequate consideration of Dr Stemmer's responses to the redundancy proposal;
  - (iii) whether there was pre-determination by the decision maker to dismiss Dr Stemmer; and
  - (iv) whether there was a failure to re-deploy Dr Stemmer to the position of the Human Resources Adviser.
- (c) Alternatively, whether Dr Stemmer was unjustifiably disadvantaged by the same actions.

[15] There is a counter claim for hearing regarding Dr Stemmer's alleged abuse of discretionary paid leave from 31 May to 14 June 2017 in attending the Americas Cup in Bermuda.

### **Were the reasons for Dr Stemmer's redundancy genuine?**

[16] Dr Stemmer states the redundancy was not for genuine reasons because there never was a strategic component to her role and there was no material change to VDB's HR support requirements justifying her redundancy.

### ***Strategic component to her role***

[17] During examination Dr Stemmer accepted her job description contained “strategic components” but she alleged she had never been required to fulfil any of those and denied she had been involved in any “strategic” HR.

[18] Neither party clarified what was meant by “strategic” in relation to Dr Stemmer’s role. The dictionary definition of “strategic” means “relating to the identification of long-term or overall aims and interests and the means of achieving them”.<sup>1</sup> Dr Stemmer’s job description contained elements that met that definition. Her work undertaken during her employment was also strategic within that definition.

[19] Her job description required her to “provide staff retention strategies and support” to “work with managers to identify key staff and develop retention strategies to retaining their critical skills, knowledge and experience”. Dr Stemmer gave evidence about her role in the advising on the restructuring of the Senior Leadership Team as well as VDB’s warehouse management. Both restructurings were “strategic” because they involved identifying VDB’s long term goals and how the current workforce could achieve them. This process was not completed until January 2017.

[20] Her job description role required she “build effective relationships with Unions” including “support site managers with the effective negotiation of collectives”. In April/May 2016 she advised on the extension of the collective agreement. Issues such as the term of any collective agreement and the wages/allowances payable to the workforce would also be strategic. Her advice about the extended collective agreement would be aimed at meeting the future needs of VDB through its unionised workforce.

### ***Material change in VDB’s HR Support requirements***

[21] The above strategic areas of her job had been completed by January 2017. The majority of VDB’s restructuring of its workforce had occurred by then. Bargaining for a collective agreement was also well underway. There was evidence of a material decrease in the level of “strategic” HR support VDB required by January 2017.

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<sup>1</sup> Oxford dictionary online ed <https://en.oxforddictionaries.com/definition/strategic>.

[22] Although it still required operational HR advice, VDB no longer required the high level of expertise Dr Stemmer could provide.

*Cost savings*

[23] There were other reasons for her redundancy. There was little doubt VDB made immediate significant savings from the proposal of at least \$65,000. Although Dr Stemmer alleged she could create greater savings by her advice, VDB did not accept this. There was also little evidence these savings were more than possibilities. They were not probabilities.

[24] No new position was in fact created. All HR support is now being provided by Mr Sheridan. Dr Stemmer's position was surplus to requirements. Overall there were genuine reasons for this redundancy.

**Was there an improper motive to disestablish her position due to Dr Stemmer's and GL's influence over the business?**

[25] The primary evidence of improper motive arises from discussions Dr Stemmer allegedly had with Mr Sheridan. These are summarised below:

- Her employment would be reviewed in February 2017 with a raise to market value. On 1 May she was told her review had not occurred because she expected a raise and "how would it look to give you a raise and then make you redundant?";
- VDB does not make people redundant;
- The CEO had proposed the restructuring;
- The Senior Leadership Team (SLT) was "consulted" when it was not;
- She would not be interested in the new position because of the lower salary and loss of car
- The reason for the redundancy was the "GL and Donna powerhouse"
- She had expressed dissatisfaction with her role previously and suggested her role be disestablished.

### ***No February performance review***

[26] There was evidence VDB's annual performance reviews occurred in April after the financial year ended on 31 March. This appears logical to enable the company to assess its financial position before increasing salaries.

[27] Dr Stemmers employment agreement does not guarantee any increase following review:<sup>2</sup>

Your performance and salary will be reviewed on an annual basis although your salary will not necessarily be adjusted.

[28] There was no reason given the above clause in the employment agreement for Mr Sheridan to make the alleged statement or to have concerns about holding any review. I am not satisfied Mr Sheridan made the alleged statement in the circumstances. There was no evidence her performance factored into the redundancy decision at all.

### ***VDB does not make people redundant***

[29] Dr Stemmer alleged Mr Sheridan told her VDB "does not make people redundant" when she raised redundancy compensation during her initial employment discussions. Mr Sheridan denied saying this.

[30] Dr Stemmer's agreement contained redundancy provisions including one month's redundancy compensation.<sup>3</sup> There was no logical reason for Mr Sheridan to make such a statement in these circumstances. I am not satisfied he did.

### ***CEO had proposed the restructuring***

[31] Dr Stemmer alleges on 1 May she was told by Mr Sheridan that the CEO proposed the redundancy when he did not. Initially it was unclear to me the significance of this statement until hearing. At hearing Dr Stemmer linked the CEO allegedly proposing redundancy to a rumour she'd heard that her investigation into the CEO's employee relative was the reason for her termination.

[32] This allegation was not specifically raised in her personal grievance letter or the statement of problem. The allegation is partly referred to in her witness brief at

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<sup>2</sup> Employment Agreement dated 27 July 2016 clause 8.2.

paragraph 5.21 as a “rumour” she heard that she was being terminated because of a bullying investigation.

[33] Mr Sheridan accepts she made him aware of this rumour and he told her it was untrue. Given the lack of specificity at the time he took no further steps to investigate. No other witnesses were identified or produced at hearing to support this allegation. There was no evidential basis other than speculation.

[34] Given the late clarification of this statement, the CEO was not given any opportunity to present evidence at hearing. At best I have two witnesses whom disagree about their conversation. I am not satisfied this was said at all.

***SLT consulted when it was not***

[35] Mr Sheridan accepts the SLT was informed but not consulted or their support sought. The SLT are not required to be consulted about Dr Stemmer’s redundancy. I would expect the SLT would be informed of the outcome. Their support is not contingent upon the redundancy occurring. Even if Mr Sheridan had erroneously stated the SLT had been consulted and supported the proposal, I cannot see how this was a procedural defect. Dr Stemmer was aware the SLT were not the decision makers. Their support (or not) was irrelevant to Mr Sheridan’s redundancy decision. She made no issue about this statement at the time. I am not convinced this statement was made.

***No interest in lesser role***

[36] There is evidence contradicting this was said. The redundancy consultation letter dated 1 May 2017 stated she would be entitled to apply for the lesser role if the restructuring proceeded. At no stage during the redundancy process does Dr Stemmer indicate she is interested in the lesser role. She also did not raise this concern in her personal grievance letter. This was a significant statement allegedly intended to dissuade her from applying for the lesser role at all. It is not until some months later when she filed her statement of problem in September 2017 this is raised for the first time. I am not satisfied this was said.

### ***GL and Donna powerhouse***

[37] Dr Stemmer also alleged Mr Sheridan and other staff told her the reason for the redundancy was the “GL and Donna powerhouse”. Mr Sheridan denies he said this.

[38] Her personal grievance letter states “*other managers*” have referred to fears of a “*GL and Donna powerhouse*”. She now alleges Mr Sheridan said this. I am not satisfied this was said by Mr Sheridan.

### ***Dissatisfaction with her role***

[39] Dr Stemmer accepts she did say to Mr Sheridan “*it could be possible that my role would be made redundant*”. It cannot be unsurprising for Mr Sheridan to refer to these past comments as possibly supportive of the redundancy proposal. On their face they appear to be. I am not satisfied this was a defect.

[40] No contemporaneous notes taken by Dr Stemmer of this conversation or supporting witnesses were produced. She stated she had the notes but did not produce them upon legal advice.

### ***GL Discussion***

[41] It was submitted that Mr Sheridan’s discussions with GL about the redundancy were not disclosed to Dr Stemmer. This is inconsistent with the evidence. Dr Stemmer alleged Mr Sheridan told her the SLT (of which GL is a member) were consulted about her redundancy. She never at that time asked for information about the SLT discussions. She also admitted speaking to GL herself whom confirmed he had had discussions with Mr Sheridan regarding her redundancy. She knew prior to redundancy of these discussions between GL and Mr Sheridan but never asked for information about this. At hearing there was nothing apparently significant from this discussion that she did not know. It cannot have created any unfairness to Dr Stemmer or indicated improper motive.

[42] Overall I am not satisfied there was any improper motive in Dr Stemmer’s redundancy.

**Was there inadequate consideration of Dr Stemmer’s responses to the redundancy proposal?**

[43] I do not accept there was inadequate consideration of the responses to the redundancy proposal. A written response was provided on 22 May. In short VDB disagreed with Dr Stemmer's proposals.

[44] The final meeting was extremely short but given the amount of time that had elapsed (over 1 month) and the lack of any new information, this did not evidence improper motive. It did however result in the oversight of an important change to the restructuring proposal which I refer to below.

**Was there pre-determination by the decision maker to dismiss Dr Stemmer?**

[45] Given my above findings, I do not accept there was evidence of pre-determination.

**Was there a failure to re-deploy Dr Stemmer to the position of the Human Resources Adviser?**

[46] VDB had been consulting on a redundancy proposal that included the formation of a Human Resources Advisor position. Prior to dismissal, VDB determined it no longer needed to create this position at all. It did not tell Dr Stemmer that the Human Resources Advisor position was not going to be created. This was the only redeployment option she had been given. It was now no longer available.

[47] This was a material alteration to the redundancy proposal. It was relevant information to the discontinuance of her employment. The failure to inform her of the altered redundancy proposal meant she had no opportunity to consider it and provide her responses. This defect was not minor and did create unfairness for Dr Stemmer because redeployment was no longer available.

[48] Dr Stemmer was unjustifiably dismissed because VDB failed to advise her redeployment was not an option prior to her dismissal for redundancy.

***Remedies***

[49] Dr Stemmer seeks to recover her lost income, \$30,000 compensation and lost benefits of her use of the company motor vehicle and kiwi saver contributions.

[50] I decline to award any lost income or benefits. This is because there was substantive justification for the redundancy. VDB sought to restructure her position

because it was surplus to its requirements. This remains the position today. In my view further consultation may have taken place but it was unlikely to have greatly extended her employment – by days at most.

[51] Dr Stemmer only applied for permanent employment in HR which was accepted as not being readily available. She did not apply for any shorter term contract work that was available. In my view she has also not mitigated her lost remuneration.

[52] Dr Stemmer was hurt and believed VDB had not listened to her concerns. Her discovery of the lack of redeployment options following termination contributed to those feelings. This led to a suspicion VDB were trying to get rid of her. She lost confidence and developed physical symptoms of stress related illnesses.

[53] In the past 6 months the Authority has awarded between \$5,000<sup>4</sup> and \$10,000<sup>5</sup> and as high as \$15,000<sup>6</sup> to \$17,000<sup>7</sup> for unjustified dismissal due to redundancy.

[54] An award of \$15,000 is appropriate here. There was no contributory behaviour to warrant any reduction.

[55] Van Den Brink Poultry Limited is ordered to pay Dr Stemmer \$15,000 compensation pursuant to s123(c)(i) and 124 of the Employment Relations Act 2000.

**Was there an abuse of sick leave from 31 May to 14 June 2017 by Dr Stemmer attending the Americas Cup in Bermuda?**

[56] Dr Stemmer was granted paid discretionary leave for the period of time she was allegedly ill from 22 May to 14 June 2017. She had no entitlement to sick leave at the time.

[57] Despite Dr Stemmer producing a medical certificate for the same period, VDB were unaware that Dr Stemmer was in Bermuda attending the Americas Cup for a period it had granted discretionary leave.

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<sup>4</sup> *Sexton v Manuka Hill 2003 Ltd* [2017] NZERA Christchurch 98.

<sup>5</sup> *Belliard v Adison Group Ltd* [2017] NZERA Auckland 245.

<sup>6</sup> *Roach v Mega Jump Ltd* [2017] NZERA Christchurch 183.

<sup>7</sup> *Chang v World TV Ltd* [2017] NZERA Auckland 188.

[58] Dr Stemmer has a duty of good faith to be active and constructive, responsive and communicative. She knew or ought to have known it was relevant to the continuation of discretionary leave that VDB know she was not re-cooperating at home but was in fact overseas. She was deliberately oblique when emailing a medical certificate for seeking 14 days leave on 1 June telling VDB “[GP] has me trying something different this week”.

[59] Dr Stemmer was alleged to be suffering from stress related illnesses. She did not provide her medical consultation notes or a detailed medical opinion from her doctor about the travel.

[60] Long distance travel cannot have alleviated her stress. I am not convinced about the justification for travelling for health reasons. At hearing she advised she travelled to Bermuda for a short stay of 4 days. She was non-specific about the time taken to travel there and back.

[61] Even when she returned to work, she did not advise of her travels. VDB discovered the fact of her travel after she had been made redundant. VDB lost the opportunity to investigate and consider whether to continue paying her leave during her employment or seek to recover it from her annual leave entitlements.

[62] Even when VDB sought further information about her health during the period of travel she refused to provide it. VDB have been put to the expense of seeking to recover the leave paid by way of counterclaim. The impression was if Dr Stemmer was well enough to travel to Bermuda, she may have been well enough for VDB to complete the redundancy process earlier.

[63] Dr Stemmer’s actions were deliberate, serious and sustained in respect of her travel to Bermuda during a period she had been granted discretionary paid leave. They justify the imposition of a penalty of \$5,000. There is no public interest in an award of the penalty in total or part to the Crown. The entire penalty is to be paid to Van Den Brink Poultry Limited.

[64] Dr Stemmer is ordered to pay a penalty of \$5,000 to Van Den Brink Poultry Limited pursuant to s4A Employment Relations Act 2000.

[65] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

**T G Tetitaha**  
**Member of the Employment Relations Authority**