

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**[2012] NZERA Christchurch 74
5342877

BETWEEN	KAYE SYMONS Applicant
AND	WISE.NET TRADING TRUST Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Applicant in person Geoff Hamilton for Respondent
Investigation Meeting:	11 April 2012 at Queenstown
Determination:	24 April 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Kaye Symons, claims that she has been unjustifiably dismissed by the Respondent, Wise.NET Trading Trust (“WTT”).

[2] WTT denies that it unjustifiably dismissed Ms Symons, and claims that her dismissal was as a result of a redundancy situation.

Issues

- [3] The following issues require determination:
- a. Whether the position of Ms Symons was genuinely redundant.
 - b. Whether WWT followed a fair procedure in making Ms Symons redundant.

Background Facts

[4] Ms Symons stated that she had been originally employed by Wise.NET Information Systems Pty Ltd on 15 March 2010 as an Administration and Support Officer.

[5] Ms Symons explained that Wise.NET Information Systems Pty Ltd, which was based in Melbourne, sold software support systems to registered training organisations who utilised the Wise.NET products for the purposes of online training for students.

[6] Mr Geoff Hamilton, Director of WTT, stated that Wise.Net Information Systems Pty Ltd, which was managed by his son, Mr Ben Hamilton, had decided to set up an operation in Queenstown, New Zealand. Mr Hamilton explained that he and his wife had relocated from Australia to Queenstown where he had established WTT to run the Queenstown operation with effect from April 2010.

[7] Mr Hamilton explained that WTT had become the employer of Ms Symons and two other employees in addition to himself. Ms Symons, who also had a part-time position with New Zealand Customs, said that her employment with New Zealand Customs had initially been part-time but that once she had felt her employment with WTT to be secure, she had reduced her hours at New Zealand Customs to 3 hours during the week-end.

[8] Ms Symons said that there were two other employees working on a regular basis in the WTT office during the period of her employment, Ms Corrinne Lambert, a Sales Representative, and Ms Hayley Wilson, who had been employed after Ms Symons due to the increase in Ms Symons's workload, and who carried out the same duties as Ms Symons.

[9] Ms Symons's salary had originally been paid by Wise.NET Information Systems Pty Ltd, but upon the establishment of WTT, Mr Hamilton said that WTT had reimbursed Wise.Net Information Systems Pty Ltd for the salaries which had been paid on its behalf.

[10] Mr Hamilton, whose professional background was that of an accountant, and who had previously held the position of Assistant Auditor General of Western Australia, stated that on or about August 2010 he had become concerned that the business of Wise.NET Information Systems Pty Ltd in Melbourne was not being operated efficiently. Mr Hamilton said that he had subsequently gone to Melbourne on 18 December 2010 to check the accounting practices and procedures which were being adopted there.

[11] Mr Hamilton explained that the financial performance of Wise.Net Information Systems Pty Ltd had been adversely affected by a downturn in student numbers due to Immigration Law changes which had impacted upon its core client base during the latter period of 2010.

Events on 28 January 2011

[12] Ms Symons stated that at approximately 5 p.m. on 28 January 2011 Mr Hamilton had arrived at the office where she worked. Apart from Ms Symons, only Ms Lambert was present as Ms Wilson had finished work early that day.

[13] Mr Hamilton explained that he had been asked by his son, Mr Ben Hamilton, to attend at the office to participate in a conference call, but that he had not been informed of the reason for the call.

[14] Ms Symons said that Mr Geoff Hamilton had taken a telephone call from Mr Ben Hamilton, which he had subsequently placed on the speakerphone, and that Ms Mary Kyriacou, Operations and Retention Manager for Wise.Net Information Systems Pty Ltd, had also been participating in the conference call.

[15] Ms Symons said that Mr Geoff Hamilton had told her that Mr Ben Hamilton had wanted to speak to her via the telephone conference call. Ms Symons said Mr Ben Hamilton had told her that her position was being terminated with immediate effect, that it was a purely commercial decision, and that it was not related in any way to her performance, for which he thanked her.

[16] Ms Symons said that she had asked if the decision was connected to her rate of pay, and had offered to take a salary decrease, but that in reply Mr Ben Hamilton had reiterated that it was a purely commercial decision.

[17] Ms Symons said she had told Mr Ben Hamilton that jobs were difficult to find in Queenstown at that time of the year, to which his response had been that she should obtain more hours working for New Zealand Customs. Ms Symons said she had explained that she could not obtain enough hours at New Zealand Customs to meet her income requirements.

[18] Ms Symons stated that she had then asked Mr Ben Hamilton for how much longer she was able to work, to which he had replied that she was to leave immediately, that she was to give her office keys to Mr Geoff Hamilton, and that she would be paid her one week's notice entitlement in lieu.

[19] Ms Symons said that she had then pleaded for her job, but Mr Ben Hamilton had stated that he had to go to another meeting, and had left the call. Ms Symons said that Ms Kyriacou had then spoken to her.

[20] Ms Symons stated that at this point she had realised that the door to the other part of the office was open and that Ms Lambert would have been able to overhear the conversation, which she said had made her feel very embarrassed, and she had asked Mr Geoff Hamilton to close the door.

[21] Ms Symons said that Ms Kyriacou had reiterated that the decision to terminate her employment had not been connected to her work performance and had instructed her to give her office keys to Mr Geoff Hamilton and to leave the office immediately.

[22] Ms Symons explained that Ms Kyriacou had then told her not to call anyone in the Melbourne office as there were employees there who were going to be informed that their positions were redundant. However Ms Symons said that she was so shocked at what had happened to her that she could not in any event have spoken to anyone in the Melbourne office.

[23] Ms Symons said that she had been shocked and had felt numb when the telephone call had finished. Ms Symons said she had told Mr Geoff Hamilton this and that he had remarked that the wrong person must have been chosen. Mr Geoff Hamilton confirmed at the Investigation Meeting that Ms Symons had been shocked by the news she had received on 28 January 2011.

[24] Ms Symons said Mr Geoff Hamilton had asked for her keys, and had taken them off her key ring; and that he had then explained that his wife was waiting and had left the office.

[25] Ms Symons stated that she then heard Ms Lambert receive a telephone call from Ms Kyriacou and had heard Ms Lambert say that she could not believe it and that she felt like crying. Ms Symons said that when Ms Lambert came off the telephone to Ms Kyriacou, she had given her a hug and had then left the office.

[26] Ms Symons said that she had then telephoned Ms Kyriacou and asked if she and Mr Ben Hamilton would reconsider their decision regarding her termination of her employment, but that Ms Kyriacou's response had been to tell her that she should not be in the office on her own, and that Mr Geoff Hamilton should have waited until she had left.

[27] Ms Symons explained that she had asked Ms Kyriacou for a letter confirming her redundancy and whether Ms Kyriacou would act as a referee for her, which Ms Kyriacou agreed to do. However Ms Symons said that she had not received the letter until 15 February 2011.

[28] The letter of 15 February 2011, signed by Ms Kyriacou, stated:

Dear Kaye,

Further to our meeting of 28 January 2011 I regretfully inform confirm that your employment with Wise.NET is terminated effect immediately.

This is due to your position having to be made redundant, and in no way reflects your performance in your job, which has been entirely satisfactory.

We appreciate your efforts and contribution that you gave Wise.NET during your time of employment from 15 March 2010 until 28 January 2011.

Please feel free to use me as a verbal reference.

[29] Ms Symons said that once the telephone call with Ms Kyriacou had finished she had left the office, but in doing so realised that she could not lock the office door as she no longer had a key. Ms Symons explained that because she was concerned not to leave the office unlocked all weekend, she had telephoned and spoken to Mr Geoff Hamilton's wife, who told her that she would ask Mr Hamilton to return and lock the office door.

Determination

Whether the position of Ms Symons was genuinely redundant

[30] The Court of Appeal in *GN Hale & Son Ltd v Wellington Caretakers IUOW*¹ clarified that:

An employer is entitled to make his business more efficient, as for example by automation, abandonment of 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 a right to continued employment if the business can be run more efficiently without him.

[31] Mr Geoff Hamilton's evidence established that the financial position of Wise.NET Information Systems Pty Ltd had been adversely impacted by the downturn in student numbers affecting its key client base during 2010 and early 2011.

¹ [1991] 1 NZLR 151

[32] I accept that as a consequence WTT had been adversely affected by the financial difficulties encountered by its parent company Wise.NET Information Systems Pty Ltd, which resulted in the decision to reduce employee numbers in both companies.

[33] Mr Geoff Hamilton explained that three employees based in Melbourne had been made redundant at the same time as Ms Symons, and that following Ms Symons's termination on 28 January 2011, Ms Lambert had also left WTT and had not been replaced. Additionally Mr Hamilton stated that since January 2011 two further employees had been made redundant.

[34] It appeared from the evidence of Ms Symons and Mr Geoff Hamilton that although Ms Wilson carried out the same duties as Ms Symons, she was less highly paid and that consequently Ms Symons's position had been selected for redundancy on the basis that it was more costly to continue to employ her than Ms Wilson.

[35] I determine that Ms Symons's employment was terminated as a result of a genuine redundancy on commercial grounds.

Whether WTT followed a fair procedure in making Ms Symons redundant

[36] The Test of Justification prior to the amendment on 1 April 2011 and which is applicable in this case, is set out at s 103A of the Employment Relations Act 2000 ("the Act"):

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"

[37] The decision must be both substantively and procedurally fair. The test as set out in s103A requires the employer to establish both limbs of the test and adheres to the principles of natural justice.

[38] When considering whether or not WTT followed a due and proper process when terminating Ms Symons's employment on the basis of redundancy, other provisions of the Act are relevant. Section 4 of the Act addresses the requirement for parties to the employment relationship to deal with each other in good faith.

[39] Section 4(1A)(c) in particular is relevant to a redundancy situation and 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 an employee to provide to the employee affected:

“(i) *access to information, relevant to the continuation of the employees’ employment, about the decision; and*

(ii) an opportunity to comment on the information to their employer before a decision is made.” s4 (1A)(i) and (ii).

[40] In a redundancy situation a fair and reasonable employer must, if challenged, be able to establish that he or she has complied with the statutory obligations of good faith dealing in s4 of the Act. His Honour Chief Judge Colgan in *Simpsons Farms Limited v Aberhart*² noted that this compliance with good faith dealing includes consultation “*as the fair and reasonable employer will comply with the law*”³

[41] The nature of consultation was commented upon by the then Chief Judge Goddard in *Cammish v Parliamentary Service*⁴ who stated:

Consultation is to be a reality, not a charade. The party to be consulted must be told what is proposed and must be given sufficiently precise information to allow a reasonable opportunity to respond. A reasonable time in which to do so must be permitted. The person doing the consulting must keep an open mind and listen to suggestions, consider them properly, and then (and only then) decide what is to be done. However, consultation is less than negotiation and the assent of the person consulted is not necessary in the action taken following proper consultation.

[42] Ms Symons stated that the telephone call on 28 January 2011 was the first intimation of redundancy of which she had been made aware. Mr Geoff Hamilton confirmed that this was the case, and further stated that he himself had not been aware that Ms Symons was about to be made redundant, or that that had been the purpose of the telephone conference call on 28 January 2011.

[43] I find that there was no consultation with Ms Symons who was not provided with:

- advance notification of the proposal to make her position redundant;

² [2006] ERNZ 825,842

³ Ibid at para [40]

⁴ [1996] 1 ERNZ 404, per Goddard CJ at p417

- information relevant to that proposal; and
- a real opportunity to provide any feedback.

[44] In this latter respect I note that during the telephone conversation with Mr Ben Hamilton Ms Symons had offered to reduce her salary. This may have, if her offer had been considered and accepted, had had the effect of altering the selection of her position for redundancy since Ms Wilson had less service with WTT than Ms Symons. However Mr Ben Hamilton had rejected this suggestion without appearing to give it any serious consideration.

[45] I do not find that WTT followed a fair procedure in making Ms Symons redundant.

[46] I determine that Ms Symons has been unjustifiably dismissed.

Remedies

[47] I find that WTT did not comply with either the basic tenets of natural justice or with the statutory good faith obligations. I further find that WTT did not act as an employer acting fairly and reasonably would have acted in all the circumstances. Ms Symons has been unjustifiably dismissed and is entitled to remedies.

Reimbursement of Lost Wages

[48] Ms Symons was unable to find alternative employment for eight weeks following the termination of her employment by WTT. Ms Symons is to be reimbursed for lost earnings for that eight week period.

[49] I make the following award:

- a. A payment in respect of lost wages of \$7,680.00
gross
- b. As interest on that amount, \$384.00 pursuant to s 11,
Sch 2, Employment Relations Act 2000 (“the Act”)

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[50] Ms Symons is also entitled to compensation for humiliation and distress. I find that the abrupt manner of communicating her dismissal, and of which Mr Symons had been provided with no prior warning, had left Ms Symons in a state of shock and feeling numb.

[51] I further find that the fact that another employee, Ms Lambert, had been able to overhear what was taking place on the telephone call on 28 January 2011 between Ms Symonds, Mr Ben Hamilton, and Ms Kyriacou, had been a cause of embarrassment to Ms Symons and had added to her sense of hurt and humiliation.

[52] I additionally find that the observation by Ms Kyriacou that Ms Symons should not have been left alone in the office and that she should have left immediately implied that Ms Symons was not to be trusted and unfairly besmirched her integrity, compounding her distress.

[53] I order that WTT is to pay Ms Symons the sum of \$7,000.00, pursuant to s 123(1) (c) (i) of the Act.

[54] I have considered the matter of contribution as I am required to do under s124. Ms Symons did not contribute to either of the situations which gave rise to the grievances. There is to be no reduction in remedies.

Costs

[55] While costs are reserved, I note here that, subject to her submissions, Ms Symons represented herself and, unless she incurred legal costs, it is therefore unlikely she has grounds to claim a contribution to any fair and reasonable costs.

Eleanor Robinson
Member of the Employment Relations Authority