

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Fran Tollan (Applicant)
AND Advance International Cleaning Systems (NZ) Limited
(Respondent)
REPRESENTATIVES G Ogilvie for Applicant
H Younan for Respondent
MEMBER OF AUTHORITY G J Wood
INVESTIGATION 23 August 2005
MEETING Wellington
DATE OF 30 August 2005
DETERMINATION

DETERMINATION OF THE AUTHORITY

The Facts

1. The respondent (Advance) is a company specialising in sales of cleaning supplies. Its head office is in Auckland, while it has a number of branches, including one in Wellington. Ms Tollan was employed in the Wellington branch in November 2000 in an administrative role in customer services. In 2004 she had an ACC claim as a result of injury. This meant that she could not continue to regularly lift heavy items of stock. As a result an additional staff member was taken on, part of whose duties were to do the lifting on behalf of Ms Tollan, although she occasionally still did do work involving lifting.
2. Over the course of Ms Tollan's employment management made it clear on many occasions that the branch was not performing to the company's financial expectations. In reality, in the four years Ms Tollan worked for Advance, she was only once told that the branch had met budget. Contributions were sought from staff as to how the situation could be improved, and in fact on one occasion Ms Tollan provided a written

plan about how matters could be improved, but this plan was not implemented because management did not consider it to be the most profitable way forward for Advance.

3. Matters reached a crisis point, however, in January 2005. On 20 January Advance's managing director, Jiwa Nadan, and its general manager operations, Hadi Younan, made a visit to the Wellington branch. All the staff were told that unless sales improved dramatically then the branch could not continue carrying the costs it had. It was made clear that if such improvements were not made then costs would have to be cut, including potential cuts in staff numbers.
4. Mr Younan then had an individual discussion with Ms Tollan. She was asked what she and other workers did in the branch and was then asked if she had any suggestions about how to improve matters. Ms Tollan decided not to make any suggestions, given her experience with the plan she had previously provided.
5. Ms Tollan then raised with Mr Younan her concern that if somebody was to be made redundant in the branch then it would be her. In making this finding I rely on Mr Younan's clear recollection, compared with Ms Tollan's original inability to recall this matter. Furthermore, the letter of redundancy hints at the fact that prior consultations had occurred with Ms Tollan.
6. Mr Younan told Ms Tollan that no decisions had been made at that point and I accept that they had not.
7. The next time the issue of the company's performance was discussed with Ms Tollan was on 8 February 2005, when Mr Younan visited again. He informed Ms Tollan that the decision had been taken that her position was redundant effective from 23 February. Ms Tollan was instead offered a part time position for two days a week, with the possibility of full time employment being offered when sales returned to a sustainable level.
8. Ms Tollan told Mr Younan that she felt the decision was unfair as other workers could have had their hours reduced rather than her. Mr Younan stated that those options had been considered but rejected, and that the redundancy of her position was the best decision for Advance in all the circumstances. These matters were confirmed in a

letter from Mr Younan to Ms Tollan dated 9 February. That letter contained the following information, as quoted verbatim –

“Over the past several months we have been monitoring the performance of the Wellington branch in order to make it more sustainable. As you are well aware our sales in the Wellington region have declined considerably compared to the resources employed. January sales being the lowest sales in 2 years we had to make decisions on some immediate changes to sustain our Wellington branch business.

Given your recent health issues, your employment with us is currently confined to data entry, sales and service support. Our service and sales business has shown no improvement over the past few months. In fact we have gone backwards in most areas.

Given the above findings we are left with no choice but to reduce cost in the branch. Management decision was that we do not have enough work to justify your employment; therefore your position is redundant ...

Fran, I believe you have a good understanding of the situation we are in and the reasoning behind our actions ...”

9. Ms Tollan declined the part time position. She gave evidence of being totally surprised when she was told her position was redundant and of being concerned that Advance was relying on her health problems as a reason for terminating her employment. She was very upset about the whole matter even at the investigation meeting, as she felt she had had no opportunity for input whatsoever into her redundancy.
10. After Ms Tollan’s employment ended the branch manager asked her to return to work to do three day’s work to assist with a backlog of work in the branch. She accepted this offer, but was told not to return after she had completed one day’s work. She was never paid for the extra two day’s work. Mr Younan’s evidence was that he was not involved in the decision to stop Ms Tollan’s work after one day, but there was no other evidence provided to contradict Ms Tollan’s claims in this area and I accept that events occurred as she claims, having no reason to disbelieve her over such a relatively minor point.

The Law

11. Under the Employment Contracts Act 1991 an employee who was made redundant through no fault of their own was entitled to a dignified exit. One issue in determining

whether a dignified exit had occurred was, as held in *Aoraki Corporation Ltd v McGavin* [1998] 1 ERNZ 601 (CA), whether consultation had occurred, not as to the redundancy, for that is management's prerogative, but as to the pending impact of the redundancy and the measures to be taken to mitigate that impact. An employer's duties have been increased in this area under the Employment Relations Act 2000 and in particular the Employment Relations Amendment Act (No. 2) 2004, in relation to the duty of good faith. Under s.4(1A)(b) that duty of good faith requires the parties to be -

“active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.”

12. Those duties of good faith are further set out in section 4(1A)(c) by the requirement on an employer who is proposing to make a decision that will have an adverse effect on the continuation of employment of an employee to provide to that employee, access to information relevant to the continuation of the employee's employment, about the decision, and an opportunity to comment on the information before the decision is made.
13. To breach this duty of good faith in a redundancy situation will almost inevitably result in a personal grievance of either an unjustified action to the employee's disadvantage, or an unjustifiable dismissal of the employee.

Determination

14. There is no claim that this was not a genuine redundancy, as Ms Tollan accepts that Advance was entitled to reduce staff numbers and consequently costs in its Wellington branch, given its recent performance.
15. I do not accept that Ms Tollan was discriminated against on the grounds of her health status in the decision to make her position redundant. Rather I consider that Mr Younan's reference in the redundancy letter to Ms Tollan's health issues was simply one that noted that due to her health issues her employment involved certain stated matters only. I find that accordingly it was not a matter taken into account by Advance in determining Ms Tollan's position as being surplus.

16. Advance clearly consulted with Ms Tollan about the prospect of redundancies, should the branch's financial position not improve. Ms Tollan was told about the branch's problems and the implications of them, and given an opportunity to provide suggestions about how the branch's performance could improve. All that is good business practice. However, it did not go as far as the law requires, because there was no information given to Ms Tollan about the fact that her job would be the one to be made redundant, and consequently no opportunity for her to comment on that conclusion. Furthermore, there was no consultation as to the pending impact of the redundancy on her personally and the measures to be taken to mitigate that impact.
17. Advance, no doubt through an ignorance of the law, genuinely thought that it had done enough, but that is not the legal position, unfortunately for it. While Ms Tollan was aware that she might be the first one to be made redundant in the branch, she was still entitled to specific consultation on the proposal that she might be made redundant and how it might be effected. She was denied these legal entitlements and therefore she was either unjustifiably dismissed, or her employment was unjustifiably affected to her disadvantage, i.e. she has a personal grievance.
18. Fortunately Ms Tollan was able to find another position soon afterward and as she had at least some inkling that she was likely to be made redundant, I find that the level of compensation required to remedy her grievance is at the lower end of the scale. I assess compensation under section 123(c)(i) to be appropriately set at \$4,000. There is no issue of any contributory behaviour by Ms Tollan. She was dismissed for redundancy through no fault of her own and she was not responsible for the procedural failings of Advance.
19. Given that I have accepted Ms Tollan's claim that she was re-engaged on a casual basis for three day's work, but was only given work and paid for one day, she is also entitled to an additional two day's pay. I leave it to the parties to determine what that gross sum is and for Advance to pay the sum accordingly to Ms Tollan. Leave is reserved should the parties be unable to agree on this straightforward calculation.

20. I therefore order the respondent, Advance International Cleaning Systems (NZ) Ltd to pay to the applicant, Fran Tollan, \$4,000 in compensation under section 123(c)(i) and two day's pay.

Costs

21. Costs are reserved.

G J Wood
Member of Employment Relations Authority