IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2014] NZERA Christchurch 137
5454590

	BETWEEN	ROHAN VIDGEN Applicant
	A N D	A STEP UP JOINERY LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Philip de Wattignar, Advocate for Applicant Neil Rutherford, Advocate for Respondent
Investigation Meeting:	14 August 2014 at Dunedin
Submissions Received:	14 and 25 August 2014 from Applicant 21 August 2014 from Respondent
Date of Determination:	3 September 2014

DETERMINATION OF THE AUTHORITY

A. **The Applicant was unjustifiably dismissed by reason of a flawed process, although the decision to disestablish her role was substantively justified.**

B. **The Applicant was not unjustifiably disadvantaged when the respondent required her to take daily 30 minute lunch breaks away from her workstation.**

C. **The respondent was not justified in withholding three days' notice pay, although this is encompassed in the remedies awarded to Ms Vidgen in respect of the unjustified dismissal.**

D. **Costs are reserved.**

Employment relationship problem

[1] Ms Vidgen complains that she was unjustifiably dismissed with effect from 6 March 2014 and that she has suffered unjustified disadvantage in her employment. One alleged unjustified action related to alleged harassment by Mr Rutherford, the director of the respondent company, in respect of a requirement to make her take meal breaks away from her workstation. Ms Vidgen's written personal grievance, sent by Mr de Wattignar, also complained of unilateral reductions in Ms Vidgen's days of work over a period of time. However, at the start of the investigation meeting, Mr de Wattignar confirmed that this latter complaint did not constitute a claim in itself, but was background information. His subsequent application in his submissions in reply for a penalty to be imposed upon Mr Rutherford in respect of an alleged failure to consult about the reduction in hours is therefore misplaced, in light of his earlier to the Authority statement that Ms Vidgen was not pursuing a claim about the reduction in hours.

[2] The respondent company denies that it unjustifiably dismissed Ms Vidgen, stating that she was made redundant in a substantially and procedurally fair way. It also denies harassment of Ms Vidgen in respect of the requirement to take meal breaks.

[3] Finally, Ms Vidgen complains that she has not received correct sick pay or holiday pay and did not receive notice pay. I directed that the parties should seek to agree what Ms Vidgen was owed in respect of sick pay and holiday pay and to revert to the Authority if they were unable to do so. The issue of the unpaid notice pay will be dealt with in this determination.

Brief account of the events leading to the dismissal

[4] Ms Vidgen had been employed by the respondent company for approximately 7.5 years as its accounts manager. She carried out a number of tasks typical of such a role, including credit control, payment of accounts, monthly cashflow reports, payroll and keeping a production schedule. Around the time of her dismissal, Ms Vidgen worked with Mr Vialle, who was responsible for IT and estimates and who had a technical knowledge of the materials purchased by the respondent and of the products

produced. The third person working in the office was Mr Rutherford himself who, Ms Vidgen said, *did everything*.

[5] It became clear during the giving of her evidence that tensions had been brewing between Ms Vidgen and Mr Rutherford over the preceding months, mainly due to the company reducing her working hours from five days a week to four days a week. This had occurred on three separate occasions during her employment and, unsurprisingly, caused Ms Vidgen anxiety about her income. However, it appears that Ms Vidgen accepts that these occasions were necessitated by financial difficulties that the company had been experiencing since the global financial crisis.

[6] On 21 January 2014 Ms Vidgen returned to the office after the Christmas break. Her evidence is that within a couple of hours of starting, Mr Rutherford told her that he required her to take a full 30 minute meal break away from her workstation. It is common ground that Ms Vidgen took umbrage at this requirement and that an argument ensued. Later on that day, Mr Rutherford prepared a letter which he gave Ms Vidgen towards the end of the day. This letter stated:

> *Dear Rohan,*
>
> *Rest and meal breaks.*
>
> *As a responsible employer I know I must look after my staff's health and safety in the work place. In recent years you have been working through your lunch breaks and continuing throughout the day. I have become more aware of the health issues and extra stress that can affect people who have prolonged exposure to excessively long work periods without a reasonable rest breaks (sic). I also understand that your role incurs an amount of stress and feel that it is very important that you take your lunch break away from your desk to relax and recharge yourself. You must take your rest and meal breaks away from your desk.*
>
> *In order to keep the office staffed at all times during the day it is requested that you work in with other colleagues to arrange the meal breaks so the office is always staffed to attend to our client's needs.*
>
> *This change will have some affect on your start and finish times for the day or the number of hours worked each week. I have listed three acceptable options below. I am happy to discuss these and any other option you may feel would suit.*
>
> *1/ Start work 30 minutes earlier:*
> *Start work at 8:30am with 30 minute lunch break you will complete your working day at 5pm.*
>
> *2/ Finish work 30 minutes later:*

> *Start work at 9am with a 30 minute lunch break you will complete your 8 hour work day at 5:30pm.*
>
> *3/ Reduce hours of work:*
> *Start your working day at 9am and with your 30 minute meal break you will complete your working day at 5pm therefore reducing your working day to 7 hours 30 minutes x 4 days making your current working week 30 hours.*
>
> *I look forward to working with you this year. Please let me know what option would suit you best.*
>
> *I thank you for your support.*
>
> *Yours sincerely*
> *Neil Rutherford*
> *Managing Director*

[7] Mr Rutherford's evidence was that during the following days he gave up insisting that Rohan take her meal breaks away from the desk and he was away on the Friday of that week. Ms Vidgen says that she complied with the request on the Thursday of that week. She wrote a letter of reply on 22 January taking issue with the request in Mr Rutherford's letter. She stated that she did not see the necessity to take meal breaks away from her desk and said that she did not wish to either start earlier or finish later. She complained about the stress of having her hours reduced and included the following paragraph:

> *From my perspective, this idea of meal breaks is just another way to harass me. Frankly, I just feel I am being persecuted. It is your responsibility as an employer to provide a psychologically and physically safe environment – and this is not happening. My stress levels would be considerably lowered if I felt I was working in a fair and equitable situation where my work and skills were respected, which they clearly are not.*

[8] Ms Vidgen visited her doctor because of the stress she was feeling and, although she was signed off from Tuesday 28 January (she did not work on Mondays) she went to work that day and the following day. Her first day of sick leave was therefore Thursday 30 January 2014.

[9] During her absence on sick leave, which was certificated to last until 28 February 2014, Ms Vidgen received a letter from Mr Rutherford in the following terms:

> *Dear Rohan,*
>
> *Company restructuring*
>
> *Due to the reduction of work, changes with intellectual technology, internet banking and further restricting within the companies administration roles there is no longer enough administration work to justify your full time position. I regret to inform you're* [sic] *your current position as senior accounts administrator had been dissolved.*
>
> *Rohan I appreciate your dedication to this role and the hours you have put in. You have worked diligently for the company and we have been very proud of the work you have completed for us especially the PDF product brochure.*
>
> *I have enjoyed the support you have given me during some difficult times. My only regret is that we could not continue working together.*
>
> *I thank you for your support.*
>
> *Yours sincerely*
> *Neil Rutherford*
> *Managing Director*

[10] Ms Vidgen received an email from Mr Rutherford on 21 February in the following terms:

> *Hi Rohan,*
>
> *I am still reeling from this letter yesterday and am sure you are also.*
>
> *Having discussed this matter with Alex last night it was agreed that this is the right thing to do; although it is never easy.*
>
> *I did not make things very clear so will try again, In line with your employment contract I am giving you the two weeks notice as from yesterday.*
>
> *Mostly I wish you well with your recovery. Please let me know if there is anything you need.*
>
> *Kind regards*
> *Neil Rutherford*

[11] It was the evidence of Ms Vidgen that she accepts that the company needed to reduce its overheads and that a reduction in staff numbers was an appropriate way to achieve this. She says, however, that prior to receiving the letter dated 20 February, she had no idea that Mr Rutherford was contemplating a restructuring of the company that would lead to her role being disbanded. She accepted that there had been

discussions over the years about the need to reduce overheads and improve the financial position of the company.

[12] Mr Rutherford, in his evidence, effectively concedes that he did not make any contact with Ms Vidgen about the possibility of her role being made redundant prior to him writing the letter of dismissal. His evidence was that he realised the need to do this only when Ms Vidgen had gone off on sick leave and he had had to step in to carry out her duties. He said, however, that conversations had taken place between him, Ms Vidgen and Mr Vialle in the preceding months in which they had discussed the possibility of having to reduce the administration costs.

[13] Ms Vidgen says that she was not paid anything after 16 February 2014. With respect to her notice pay, Ms Vidgen was signed off on sick leave until Friday 28 February. Her next day at work was due to be Tuesday 4 March. Her notice expired on Thursday 6 March. Therefore, she says she should have been paid notice pay in respect of those three days.

[14] Mr Rutherford's evidence is that he did not pay her for these three days because she did not turn up for work. Ms Vidgen's evidence is that she regarded herself as having already been dismissed and did not realise that Mr Rutherford required her to come to work on those three days. She also said that *enough was enough* and she had already consulted Mr de Wattignar in respect of concerns at her dismissal.

[15] Mr de Wattignar wrote a letter raising a personal grievance on 25 February 2014 in which he stated that Mr Rutherford was not to contact Ms Vidgen directly. Mr Rutherford did not know when he received that letter, but suspected that it was prior to the expiry of Ms Vidgen's sick leave. He admits that he did not contact either Ms Vidgen or Mr de Wattignar to make clear that he expected her to turn up for work between 4 and 6 March.

The issues

[16] The Authority must consider the following issues:

(a) Whether Ms Vidgen was unjustifiably dismissed, and if so, what remedies she is due.

(b) Whether Ms Vidgen suffered an unjustified disadvantage in respect of the requirement to take a 30 minute meal break away from her workstation; and

(c) Whether Ms Vidgen is owed notice pay in respect of the period 4 to 6 March 2014.

Was Ms Vidgen unjustifiably dismissed?

[17] The legal test that must be applied in answering this question is set out at s.103A of the Employment Relations Act 2000 (the Act) which provides as follows:

> ***103A Test of justification***
>
> *(3) In applying the test in subsection (2), the Authority or the court must consider-*
> *(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
> *(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
> *(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
> *(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*
> *(4) In addition the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.*
> *(5) The Authority or the court must not determine a dismissal or an action to be justifiable under this section solely because of defects in the process followed by the employer if the defects were-*
> *(a) minor; and*
> *(b) did not result in the employee being treated unfairly.*

[18] It is also relevant to take into account the duty of good faith set out in s.4 of the Act, and especially s.4(1A) which provides as follows:

> *(1A) The duty of good faith in subsection (1)-*
>
> *(a) is wider in scope then the implied mutual obligations of trust and confidence; and*
> *(b) requires the parties to an employment relationship to be active and constructive in establishing and*

maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and

(c) without limiting paragraph (b), 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 1 or more of his or her employees to provide to the employees 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 the decision is made.

[19] Having heard the evidence of Mr Rutherford and Ms Vidgen, I am satisfied that there was a genuine and material need for the company to restructure its operations in order to improve its financial position. I also accept that it was appropriate to make Ms Vidgen's position redundant on the basis that a number of production staff had already been made redundant over the preceding years and that Mr Vialle had skills that would enable him to take over some of Mr Rutherford's work which would, in turn, enable Mr Rutherford to take over most of Ms Vidgen's role.

[20] Mr Rutherford confirmed that he has not replaced Ms Vidgen and that her role is shared between himself and Mr Vialle.

[21] However, it is clear without any doubt that the procedure followed by Mr Rutherford was significantly flawed; indeed, it was non-existent. Once he had reached the conclusion during Ms Vidgen's sick leave that the company was in a difficult financial position necessitating the reduction of a role, it was his obligation under the Act to advise Ms Vidgen of this possibility prior to the decision being effected. He should have written her a letter setting out his concerns about the position of the company and put her on notice that he was considering disestablishing her role in order to address these concerns. Mr Rutherford should have invited Ms Vidgen to attend a meeting at which she could have had a support person present. He should have provided her with all relevant information to enable her to make considered suggestions to improve the financial position of the company and ways of avoiding her dismissal. Mr Rutherford should then have given genuine consideration to those suggestions, if any, and only made his decision once he had done so.

[22] He did none of these things; he simply made the decision and dropped it on Ms Vidgen out of the blue during her sick leave. Although I accept that Mr Rutherford discussed with Ms Vidgen the possibility of restructuring the company in 2013, there is no evidence that he specifically told her that her particular role was at risk and that she faced dismissal by reason of redundancy.

[23] Consequently, it is clear that Ms Vidgen's dismissal was procedurally unjustified in a significant way and that she is, therefore, entitled to remedies as a result. These will be considered below.

Was Ms Vidgen unjustifiably disadvantaged by the requirement to take her meal break away from her workstation?

[24] I accept the evidence of Mr Rutherford that he had reached the conclusion that it was necessary to require to Ms Vidgen to take a daily 30 minute lunch break away from her workstation because he had concerns about her health and safety. He said that he had attended a training course in which health and safety at work had been addressed and which made clear that health and safety obligations were not restricted to the factory floor.

[25] I therefore do not accept Ms Vidgen's evidence that Mr Rutherford was attempting to harass her.

[26] However, it would appear that Mr Rutherford's method was a little heavy handed and that instead of simply requiring her without notice to make a change in her daily work patterns, which she says she had been following for the past seven years, he should have consulted with her, advising her of his concerns, his legal obligation as her employer and then try to work out a way of accommodating these concerns.

[27] Having said this, it would appear that Ms Vidgen immediately over-reacted to Mr Rutherford's stated requirement which resulted in a rapid breakdown in communication and in the relationship.

[28] One of Ms Vidgen's particular concerns was that there was no other suitable room to sit in during the enforced lunch break. However, the Authority heard evidence that there was a room in which other staff members took their breaks which was, perhaps, not ideal and which Ms Vidgen did not like, but which was functional.

The Authority has not seen this room but accepts Mr Rutherford's evidence that it served its purpose as a lunch room.

[29] Mr de Wattignar, on behalf of Ms Vidgen, states that there has been a breach of s.69ZE of the Act and of Ms Vidgen's employment agreement. This is, he says, because Mr Rutherford unilaterally set new conditions of employment when he set out the three options in his letter of 21 January. Mr de Wattignar submits that s.69ZE(1)(a) of the Act made clear that there was a requirement for discussion between the parties when it refers to rest breaks and meal breaks to be observed during an employee's work period *at the times agreed between the employee and his or her employer*.

[30] Mr de Wattignar also refers to clause 4.1 of Ms Vidgen's employment agreement which states:

> *(Under the heading Times and Hours of Work)*
>
> *4.1 ...*
> *Rest and Meal Breaks: Morning/Afternoon 10 minutes, Lunch 30 minutes. These are to be taken when client's demands allow; and to least affect normal work flow.*

[31] Clause 4.7 states:

> *The Employer can arrange Rest and Meal Breaks so that they do not cause disruption to clients, customers or production.*

[32] Mr de Wattignar submits that these references identify the only circumstances when the employer can change meal break arrangements. However, these circumstances do not cover the changes the respondent notified to the applicant by letter of 21 January 2014. Mr de Wattignar also refers to the variation of employment agreement clause which states that the agreement may only be amended or varied with written consent signed by both parties.

[33] It was Mr Rutherford's evidence that he did not dictate when Ms Vidgen was to take her break, only that she was to take a full 30 minutes away from the workstation. For this reason, I do not agree that Mr Rutherford has breached the terms of clauses 4.1 or 4.7 of the employment agreement, nor the variation clause.

[34] Also, I do not believe that Mr Rutherford has unilaterally imposed a change in Ms Vidgen's terms of employment. The employment agreement clearly allows for a lunch break of 30 minutes and this is required by statute in any event. Whilst it may have been a change in Ms Vidgen's practice to have to spend the 30 minutes away from her workstation, there was no contractual right for Ms Vidgen to have her lunch sitting at her computer. It is also well known, and has been for many years, that it is recommended that staff spend a period away from their computer screens during their working day, for their general wellbeing.

[35] In addition, it is clear from Mr Rutherford's letter that he was inviting discussion of his three *acceptable options* and inviting her to suggest *any other option you may feel would suit*. This is not the imposition of a requirement, but the signalling of a willingness on the part of the respondent company to discuss with Ms Vidgen a change in her working practices for the good of her health and safety.

[36] It is impossible to know exactly what was said when Mr Rutherford first broached the subject of the requirement to spend her 30 minute lunch break away from her workstation. It does seem clear, however, that Ms Vidgen over-reacted and that this made a further sensible discussion about the matter impossible.

[37] On balance, whilst I accept that Mr Rutherford wanting Ms Vidgen to change her working practice so that she spent 30 minutes each day away from her workstation was unwelcome to Ms Vidgen, and therefore a disadvantage to her, I do not believe that either the requirement itself nor the way in which it was communicated to Ms Vidgen constituted an unjustified action by the respondent.

Notice pay

[38] It is clear that there was a misunderstanding between the parties as to whether or not Ms Vidgen should attend work on 4, 5 and 6 March 2014. However, having sent a letter of dismissal to Ms Vidgen in which he was silent about his requirements, the onus lay with Mr Rutherford to ensure that it was made clear to Ms Vidgen that he wanted her to come back to work once her sick certificate had expired for those three days. Although he was instructed by Mr de Wattignar not to contact Ms Vidgen directly, he could have made clear to Mr de Wattignar that he required her to work out her notice. Mr Rutherford accepts that he did not do this.

[39] Therefore, I find that there was no good reason for Mr Rutherford to withhold Ms Vidgen's pay for the dates of 4, 5 and 6 March 2014 and, accordingly, the respondent is required to make payment to Ms Vidgen of three days pay.

Remedies

[40] Having established that Ms Vidgen was unjustifiably dismissed, I must now consider what remedies are owed to her. Ms Vidgen does not seek reinstatement.

[41] Section 123(1) of the Act provides as follows:

> *(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:*
>
> *…:*
>
> *(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:*
>
> *(c) the payment to the employee of compensation by the employee's employer, including compensation for—*
>
> *(i) humiliation, loss of dignity, and injury to the feelings of the employee; and*
>
> *(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen.*

[42] Section 128 of the Act provides as follows:

> ***128 Reimbursement***
>
> *(1) This section applies where the Authority or the court determines, in respect of any employee,—*
>
> *(a) that the employee has a personal grievance; and*
>
> *(b) that the employee has lost remuneration as a result of the personal grievance.*
>
> *(2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.*
>
> *(3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.*

[43] I have already found that the decision to make Ms Vidgen redundant was substantially justified. Therefore, it is not appropriate to award Ms Vidgen lost wages from the date of her dismissal to the expiry of three months, or some such later date, as I am satisfied that, if a fair process had been followed, it is more likely than not that

Ms Vidgen's position would still have been disestablished and Ms Vidgen's employment terminated.

[44] However, it is appropriate to consider how long a fair process would have taken, during which time Ms Vidgen would have been in receipt of her normal pay. A fair process could not have commenced until Ms Vidgen's absence through sick leave had ended. This was 28 February 2014. Assuming that Mr Rutherford had followed a fair process, I believe that that consultation process could have been finished within the period of two weeks.

[45] Therefore, I believe it is appropriate to award Ms Vidgen the sum of $1,453.84, being two weeks' gross pay (at four days per week). She would then have been entitled to a further two weeks' notice pay. Mr Rutherford could either have paid that to her in lieu of notice or she could have worked it. In any event, Ms Vidgen is entitled to that further period of two weeks' pay (at four days per week), totalling $1,453.84.

[46] This award means that Ms Vidgen cannot be paid twice in respect of the dates of 4 to 6 March 2014 and that sum is therefore incorporated into reimbursement for lost wages under s.123(1)(b) of the Act.

[47] Turning to compensation for humiliation, loss of dignity and injury to her feelings, Ms Vidgen's evidence was not very fulsome about the effects of her dismissal, although she advised me that she felt extremely hurt and that she had been manipulated and that she had wasted the last seven and half years of her life.

[48] I accept that the manner in which Ms Vidgen learnt of her dismissal, without any prior warning or consultation whatsoever, would have caused hurt, humiliation and injury to her feelings. If Mr Rutherford had carried out a lawful consultation process with her, those effects would have been significantly mitigated in all probability.

[49] I believe that an appropriate sum to award Ms Vidgen is $7,000 in recognition of her hurt, humiliation and injury to her feelings.

[50] Under s.124 of the Act, where the Authority has determined that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider

the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[51] I am of the firm opinion that Ms Vidgen did not contribute to the manner in which she was dismissed in any way whatsoever and that it is therefore not appropriate to reduce the remedies awarded to her under s.124.

Orders

[52] I order that the respondent pay to Ms Vidgen the following:

(a) The gross sum of $1,453.84 in respect of two weeks' pay during which consultation should have taken place;

(b) The further gross sum of $1,453.84 in respect of two weeks' pay in lieu of notice.

(c) The further sum of $7,000 in respect of compensation under s.123(1)(c)(i) of the Act.

Directions

[53] The parties have been directed to seek to agree what sums, if any, are owed to Ms Vidgen in respect of sick pay and holiday pay. It is not clear from the submissions received whether agreement has been reached or not. Ms Vidgen has 14 days from the date of this determination to apply to the Authority for a determination on this matter if no agreement has been reached in that time. Of course, the lost wages that I have awarded in this determination will need to be taken into account in calculating final holiday pay.

Costs

[54] Costs are reserved. The parties are to seek to agree how costs should be dealt with between them. However, in the absence of such agreement, any costs sought by

Ms Vidgen should be set out in a memorandum from Mr de Wattignar to be served on the respondent and lodged with the Authority no later than 28 days from the date of this determination. Mr Rutherford would then have a further 14 days within which to serve and lodge any reply.

David Appleton
Member of the Employment Relations Authority