

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination Number
WA 35/08
File Number 5090990

BETWEEN SAM WATSON
Applicant

AND ADECCO PERSONNEL
LIMITED
Respondent

Member of Authority: P R Stapp

Representatives: Ross Jamieson for Applicant
Gregory Walker for Respondent

Investigation Meeting: Wellington, 13 March 2008

Determination: 1 April 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant says her dismissal from Adecco Personnel Limited (Adecco) was unjustified and unfair. Adecco says the dismissal was for redundancy and denies the Applicant's claims.

[2] Ms Watson is seeking a penalty for breach of her employment agreement, lost earnings for the time she was out of work, compensation of \$15,000 for hurt and humiliation and loss of dignity, and costs.

The Facts

[3] Ms Watson joined Adecco on 1 August 2006 in the full time permanent position of Accounts Manager for Contracts and Projects for a certain account at Adecco in Wellington and then Lower Hutt call centre. She was paid \$60,000 per annum, a \$10,000 travel allowance and car park to reimburse travel costs between working in Wellington and Lower Hutt on the account, and a

bonus was payable if the account was renewed. The account was renewed and she was subsequently paid the bonus after she had left Adecco.

[4] There was an individual employment agreement, but no written job description could be found by either party. However, it was broadly agreed Ms Watson's role was to manage the recruitment and on site requirements of a call centre. She accepted that there would be peaks and troughs in her role, and because there would be a quiet period for two and a half months, she agreed to take her holidays in that period. Adecco says that Ms Watson accepted during the quiet period her nominal attendance would be required, which she denied, but she agreed that she would take her holidays and cover other work. The employment agreement was for an indefinite period and provided that she undertake her duties Monday to Friday 8.30am-5.30pm and:

"...with such extra attendances as and when required to support the Contact Centre operating and seasonal requirements".

[5] Ms Watson denied any suggestion from Adecco that her job was part time, but accepted that her full time job would entail a quiet period (the low period) during which she agreed to take any holidays.

[6] Ms Watson reported to Mrs Donna Lynch, the National Account Manager and she was located in Palmerston North. Mrs Lynch was engaged by Adecco as a contractor and she confirmed the hours Mrs Watson was required to work. Mrs Lynch's authority related to operational matters and she did not have any authority on employment matters. At the time Ms Watson was employed Mrs Lynch would have preferred Ms Watson to be employed as an independent contractor, but the CEO at the time decided differently.

[7] During Ms Watson's employment there were staffing difficulties in Adecco's Wellington branch that required support. Mr Michael Davies, Chief Operating Officer says arrangements were made for Ms Watson to help until a replacement new branch manager was appointed. Angela Berry was appointed acting branch manager and travelled to Wellington every second week to carry out a support role. Mr Davies says he left it to Ms Berry to arrange what Ms Watson was to do. Ms Watson says she had no knowledge of any difficulties. She accepted that she agreed to help out, including carrying out reception duties at the Wellington branch. However, Ms Watson says she never agreed to a substantive change to her duties and role and started to object when she discovered that reception work was going to be long term.

[8] Mr Davies' told me his role at Adecco was to review all contracts at Adecco, including the relevant client account.

[9] On 9 May Ms Watson met with Mr Davies and he says he told her he had evaluated her role and come to the conclusion that there was not a full time position on the account at the Lower Hutt centre. She denied there was any discussion that the full time position was likely to be disestablished and a possibility of redundancy existed. It is agreed that the word redundancy was not directly referred to. However, the evidence was that the existence of the full time position on the account involved a period of time where the hours were not always fully utilised. She says that she was asked to put together a list of things that were feasible for her to do during the quiet time.

[10] On 10 May Angela Berry wrote by email to Ms Watson on the situation in the Wellington office. She explained to Ms Watson that she would need to help out where needed to keep the branch running because it was short staffed. Also she sought Ms Watson's cooperation to cover reception when required, including admin and ad hoc duties, answering calls, interviewing candidates, mail, testing and kitchen duties. Ms Watson responded on the same day that she would be taking legal advice. Mr Davies in turn replied on the same day asking her to cooperate and informing her of the need for her to cover the Wellington branch and that he would not be employing a temp for reception if the resources were otherwise available.

[11] Mr Davies emailed Ms Watson again on 10 May requesting her ideas on what would be the most efficient way to run the account operation in the future if Adecco was successful with the tender that had been made for the work. The request was also made for her to provide her ideas on how to use her skills and experience in the future.

[12] By this time Ms Watson was contesting the duties she was being asked to cover and relied on her employment agreement:

... 1.3. The company may, after consultation with you, amend your job description and the duties associated with that position but not so as to change substantially the nature or responsibilities of the position."

[13] By email on 11 May Mr Davies reiterated the need for a discussion and Ms Watson's input on how the employment relationship could continue when her current full time position no longer existed.

[14] Ms Watson says she put forward her ideas at a second meeting held on 17 May. Mr Davies rejected them. Mr Davies put forward his ideas for Ms Watson's future that involved:

- Taking up a role as branch manager in Dunedin;
- Being a consultant in Auckland; or
- Undertaking temporary roles of receptionist/administration in the Wellington branch until such time there was a determination on a further role in the Wellington Branch.

[15] Ms Watson rejected these proposals as being unsuitable.

[16] The meeting ended with Mr Davies deciding to consider the points discussed.

[17] Ms Watson denied that she caused any disharmony and disruption in regard to the issue of what she was to do in the Wellington branch and her access to the Wellington office car parks. Ms Watson says she asserted her contractual right to have a car park as they were being used by Wellington branch staff. Mr Davies says it was resolved when he intervened and told Ms Watson to make her own arrangements for a car park and the cost would be met by Adecco. Also, she objected when it became clear to her that being a receptionist would be on going. Later she moved back to Lower Hutt and to fill in her time.

[18] The parties met again on 23 May. The meeting was attended by Mr Davies, and Ms Watson and her support person, Vic Dawson. Mr Davies advised Ms Watson that her role could not continue as a fulltime role and that the only position available was the Wellington branch on a temporary basis until agreement could be reached on an ongoing role for her.

[19] Agreement could not be reached and Mr Davies says he had no option but to terminate the Applicant's employment on the grounds of redundancy as there were no other positions that would enable the Applicant to work part time on the account and part time in other roles. The decision was confirmed in writing on 24 May and Ms Watson was required to work out one month's notice, allowed time off to attend any interviews, and offered help with her CV.

[20] Ms Watson says "*her job*" was advertised by Adecco. Indeed another person was appointed to carry out the account manager position on a fixed term arrangement for the period 30 July 2007 until 31 March 2008. The salary increased. The hours stayed the same, as did the role, duties and

other terms. However, that person was subsequently appointed to the Wellington branch manager's vacancy. The person retained the account manager's role, splitting the function with another full time Adecco employee and that arrangement commenced on 1 October.

Issues

[21] Was the Applicant's position genuinely superfluous to the needs of the employer? Was there any ulterior motive for the employer to make the Applicant's position redundant? Was the Applicant told that she had to fill the role of receptionist? Did Adecco follow a fair process? Did Adecco consider all the possibilities? Did the employer do what a fair and reasonable employer objectively measured would have done in all the circumstances at the time the decision was made?

The Law

[22] In the absence of any definition in the parties' employment agreement a standard definition of redundancy means the position is superfluous to the needs of the employer: Court of Appeal in *G N Hale & Sons Ltd v Wellington Caretakers etc IUOW* [1990] 2 NZLR. Redundancy is determined in relation to the position not the employee. The employer must consult the employee under the Employment Relations Act. In addition the law provides:

"...an employer is entitled to make its business more efficient as for example by attrition, abandonment of unprofitable activities, reorganisation 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...": G N Hale & Sons Ltd v Wellington Caretakers etc IUOW [1990 2 NZLR 1079; and

"...so long as the employer acts genuinely and not out of ulterior motives, the business decision to make positions or employees redundant is for the employer to make and not for the Authority or Court, even under s 103A": Simpsons Farms Ltd v Aberhart [2006] ERNZ 825.

[23] S 103A of the Employment Relations Act requires me to determine what a fair and reasonable employer would have done objectively measured in all the circumstances at the time the decision was made?

Determination

[24] The employment relationship problem is about a full time position existing for a full time employee who was not always fully utilised. After Ms Watson's employment was terminated the role remains and the only changes were in the nature of the arrangement (now a fixed term period instead of an indefinite duration) and the salary, and the role was eventually split. The terms and hours of work remained unchanged.

[25] Adecco has satisfied me that it had reason to endeavour to change the arrangement because Ms Watson's position was full time and made no clear provision for the low period where fewer hours were required to be worked. Any arrangements that Ms Watson had to work during the low period were made orally at the time she was appointed, including that she would take her holidays during the low period otherwise it was unclear what she would do. The inconclusive nature of this arrangement made it entirely understandable why Mr Davies reviewed her role.

[26] There was no job description produced for Ms Watson's role despite it being requested by me. The closest information provided came from the tender document for the account that says Ms Watson was "specifically to manage the recruitment and on site requirements of the Lower Hutt Contact Centre." That tender also signalled Adecco's intention to have a mix of salaried employees and contractors undertake the work. A job description was attached to the new fixed term contract involving Ms Watson's successor. No argument has been pursued on the duties except for Ms Watson's complaint that she was not a receptionist. Indeed Adecco accepted that the role remained.

[27] Mr Davies told Ms Watson about his review of her role on 9 May. He informed her that he had concluded that there was not a full time position for the account manager at the Lower Hutt centre. He made his decision before giving her an opportunity to have any input and comment on his conclusion that her role was not full time. A fair and reasonable employer would have commenced consultation on this before reaching a decision.

[28] Subsequent meetings involved discussions on the options which focused on what other roles existed to replace her in the account role, but there was no agreement. These discussions would meet the requirement for consultation if there was a possibility of a redundancy situation. However, the focus centred on the removal of Ms Watson from her role instead of consulting her to get agreement on changes under to the terms and conditions on her role which remained.

[29] Ms Watson disputed that Mrs Lynch discussed with her contracting in the role and that she turned that down for financial reasons. It is common ground that Ms Watson and Mrs Lynch had some discussions but I cannot accept that those discussions could have formed any part in Mr Davies' process. Thus, he did not cover any contracting role as an option. Mr Davies was responsible for the employment responsibilities and not Mrs Lynch. Indeed Mrs Lynch told me she had no responsibility and involvement in those matters and Mr Davies' decision, although he undoubtedly had recourse to her experience as the national account manager. I find that Adecco did not offer Ms Watson the options of a fixed term arrangement and a contractor role (like Mrs Lynch's role). A fair and reasonable employer would have raised these considering the fixed term role was given to somebody else for the same job and Ms Lynch had previously proposed that the role should have been a contractor like her role.

[30] It is accepted Mr Davies never raised the word redundancy until 23 May. That would account for Ms Watson's shock and her being, as Mr Dawson confirmed "gobsmacked". I hold that this supports the conclusion that, initially, Mr Davies was genuinely trying to look for a solution without terminating Ms Watson's employment. However, his failure to put Ms Watson on notice of the possibility of her employment being terminated for redundancy was not the action of a fair and reasonable employer despite telling her in an email to discuss how the employment relationship could continue with her current full time position no longer existing and that she engage in discussing alternative roles and positions. In its defence Adecco says that Ms Watson should have anticipated from the communications that her employment would have been terminated because she had been made redundant twice before and presumably would have known what was going on. A fair and reasonable employer would have been explicit, open and transparent. It is not good enough to put the responsibility on the employee to infer that there would be a possibility of redundancy. A fair and reasonable employer would have informed her that there was possibility of her position being redundant to enable her to comment and have further input, and not announce a fait accompli.

[31] In the meantime Ms Watson objected to being placed in a receptionist's role for the duration of the low period without other people sharing that work at the Wellington office. This was being managed by Angela Berry the acting branch manager. Ms Watson says this was an amendment to her duties that substantially changed the nature and responsibilities of the position and requested Adecco to attend mediation to help. The situation also apparently involved Ms Watson allegedly causing disharmony in that office, which she denied. Certainly there was a problem about the use of a car park that was resolved and Ms Watson says she was told that no one wanted to work with her upon returning to Lower Hutt. I am satisfied that her evidence supported her claim that she was

being required to cover the receptionist role for the entire low period, without any certainty on what else she would do. I am supported in this conclusion because the evidence records Mr Davies saying “...we certainly don't plan to employ a Temp for reception if we have other resources available”. I am further supported in this conclusion because the tone of the correspondence from Adecco was to get Ms Watson's cooperation to provide cover in Wellington and the only sure thing for her related to the mention of reception duties. There was no evidence of anyone else sharing the role, no rosters and no evidence produced of any other shared arrangements. This issue became entwined in Mr Davies' redundancy process on finding her something else to do in a new role.

[32] Adecco denied that the redundancy was as a result of any unwillingness from Ms Watson to comply with what she considered to be unreasonable reductions in her responsibilities. Mr Davies says he tried to resolve the problem without the necessity of mediation because Ms Watson engaged in his process and she waived her request for mediation. I hold that ordinarily the Wellington office requirements to cover work would have been an entirely separate matter from what was emerging as a reorganisation of Ms Watson's position and changing her role. However, she had raised a dispute under the terms and conditions of her employment agreement and legitimately requested mediation where the argument over the duties became inextricably linked to Mr Davies' review of her position and decision that it no longer existed. His decision to dismiss her was unjustified where agreement could not be reached on the work cover and her existing position that remained. I further find for the above reasons that the redundancy was not genuine and did not involve a position that was superfluous to the needs of the employer.

[33] The only reason for the decision was that the Applicant had no other duties prescribed in her employment agreement to cover the low period of the account work and that she objected to being a receptionist to cover that role when that work was not being shared by anyone else in the office. I am supported by the absence of any job description that directed Ms Watson to undertake any other duties. The receptionist role was an entirely separate role that the Applicant says involved lesser skills and experience to undertake. What she was being asked to do was in effect combine the receptionist duties with the account manager role where there was no provision for it. She disputed the right of the employer to require her to do that for the duration of the low period without the certainty of any other consultancy and recruitment work, although she accepted that she was required to work and that it was reasonable for Adecco to get her to cover work. She reasonably sought consultancy work that was in line with her duties, and for whatever reason, Adecco was not able to provide. Adecco's action smothered Ms Watson's right to pursue her dispute and

disempowered her in the reorganisation discussions. Thus, Adecco can not rely upon its submission that Ms Watson waived her position on the question of accepting a redundancy consultation.

Conclusion

[34] Ms Watson has a personal grievance. I now turn to remedies. Ms Watson is seeking penalties for a breach of her employment agreement and the employer failing to include a statutory redundancy provision in her employment agreement. On the last matter first Ms Watson's employment agreement was not updated to include an employee redundancy protection provision. There is no penalty provision that applies to this section and in any event such a redundancy protection provision would not have applied here.

[35] Adecco did attempt to vary Ms Watson's terms and conditions as they related to her duties under the employment agreement to require her to combine in her role a receptionist role that she objected to. Such a variation had the potential of being a substantial change to her duties for the low period and would have required agreement. Ms Watson's objection did result in her returning to Lower Hutt and fill in her time. This is not a matter for a penalty for a breach of the employment agreement because I am not satisfied there has been any wilful or deliberate breach by Adecco and in any event the personal grievance makes available remedies to Ms Watson to address the real issue between the parties.

Contributory Fault

[36] Ms Watson did not contribute to the situation giving rise to her personal grievance when all she tried to do was to obtain some duties akin to her level of experience and responsibility and did accept that she had to provide some cover in the Wellington office but not full time receptionist duties, reasonably I hold.

Remedies

[37] Ms Watson has claimed lost wages. She mitigated her loss by obtaining other employment. Ms Watson booked her holiday during her employment and some paid leave, which she would have been entitled to, and which would have occurred during her employment if it had continued. However the actual details are required to calculate her loss of earnings (taking into account the date she was actually paid to and how much leave she was entitled to be paid and her salary

payment details, including the final pay and its details). Her start date in her new job also needs to be confirmed. I reserve leave for the parties to try and sort out the wages and if that cannot be achieved leave is granted to return for a decision.

[38] Ms Watson is entitled to compensation and I am satisfied there was an impact on her feelings in as much as she was shocked, “gobsmacked” and voices were raised at the meeting of 23 May when she was told of the decision with her partner present. She was a well paid senior employee with only a short period of employment with Adecco. She was fortunate to obtain new employment quickly and now has a permanent full time job. I award her \$8,000 compensation. Adecco is to pay Sam Watson \$8,000 compensation for humiliation, loss of dignity and injury to feelings under s 123 (1) (c) (i) of the Act.

[39] The matter of lost wages is reserved.

[40] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority