

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
OFFICE**

BETWEEN Betty-Ann Worrall
AND R Hannah & Co Limited
REPRESENTATIVES Barry Leveson for the Applicant
Alastair Sheriff for the Respondent
MEMBER OF AUTHORITY Janet Scott
INVESTIGATION MEETING 14 September 2006
DATE OF DETERMINATION 3 October 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant submits she was unjustifiably dismissed from her employment. To remedy her alleged grievance she seeks lost remuneration, compensation pursuant to s.123 (1)(c)(i), a penalty and costs in the matter.

[2] The respondent submits the applicant's employment was terminated as a result of a genuine redundancy that was implemented in a fair and reasonable manner. It denies the applicant was unjustifiably dismissed.

Background

[3] Prior to the termination of her employment, the applicant had been a very longstanding employee of Hannahs. She had been 2IC at the Manukau branch for 18 years and manager at Papakura branch for five years.

[4] In early July, the Group HR Manager for Hannahs (Martyn Hartigan), was informed by the Australian Group CEO (Michael Beagley) that the lease on the Hannahs store in Papakura was coming to an end and would not be renewed. He was told that the store would close on 31 August 2005. The closure, it was explained, was due to falling revenue and profits from that store. Mr Hartigan said that on Monday, 4 July he contacted Stephen Flack, Sales Manager, and asked him to call into the Papakura store to inform the team. He explained that he did not wish their first knowledge of the fact that the store was to be closed to be by mail and neither did he wish them to hear it from the landlord.

[5] On or about 5 July, Stephen Flack went to the Papakura branch before opening time to speak to the two staff at that branch. He spoke to each of the staff members separately. His evidence was that he spoke to the applicant and informed her of the impending closure of the branch. He also discussed with the applicant the possibility that she take up employment with the company at the Brown's Bay or New Lynn branches. His evidence was that Ms Worrall made it clear to him that the positions were not suitable for her because she did not want to travel outside the area of south-east Auckland.

[6] It was Mr Flack's evidence, and that of Mr Hartigan, that at the time that Ms Worrall was notified of her redundancy, the positions in New Lynn and Brown's Bay were the only available positions in the Auckland area.

[7] On 19 July, Mr Hartigan wrote to Ms Worrall confirming that her position would become redundant on 31 August. That letter read:

Dear Betty,

Further to your conversation with Stephen Flack (Sales Manager) I am writing to confirm the closure of your store on 31 August 2005.

Unfortunately this will of course make your role redundant.

This letter serves as four weeks notice of that fact.

Your store manager will try to resource alternative suitable employment for you. However, should he be unsuccessful on Wednesday 31 August 2005 you will receive all outstanding salary holiday pay and four weeks service pay. I would also need to advise Southern Cross of your redundancy should this be the case, in order for the necessary paperwork to be completed.

I am personally sorry your role has become redundant and if we can be of any help in resourcing your future employment, please contact me at the RSC.

Yours sincerely,

Martyn Hartigan

Group Human Resources Manager

[8] Between 19 July and 31 August, no other positions were identified that might be suitable to Ms Worrall. Mr Flack did, however, raise with Ms Worrall once again the possibility that she take up one of the positions available in either Brown's Bay or New Lynn. Ms Worrall confirms that she again declined the positions available because of the travel involved.

[9] It became apparent to Mr Flack over the weeks prior to 31 August that Ms Worrall was unhappy. He reported this to Mr Hartigan who advised him to continue to keep an eye out for alternative roles for Ms Worrall but otherwise to get on with closing the branch.

[10] In the last week of Ms Worrall's employment, Mr Hartigan personally attempted to make contact with Ms Worrall. On two occasions he was unable to contact her and on the third occasion when he spoke to her he asked her whether there was anything Hannahs could do for her and she said there was nothing he could do for her.

[11] Mr Hartigan also arranged for the General Manager, Stephen Cook, to come to Auckland from Wellington to visit the store. Mr Cook visited the store twice with Mr Flack with a view to speaking to Ms Worrall. The first time she was not there. The second time it was the final day of the store's trading. That time he took flowers to give to her and the other staff members who were being made redundant. However, Mr Cook informed Mr Hartigan later that Ms Worrall did not wish to speak to him and would not accept the flowers given to her.

[12] Ms Worrall does not challenge the redundancy per se. She accepts the decision to close the Papakura branch was a genuine commercial decision and accepts that as a result of that decision her position became redundant.

[13] The crux of Ms Worrall's complaint against the company is that she had become aware that there was a proposal to open a store in Onehunga and it is her belief that the company should have discussed the possibility of an alternative position for her at Onehunga.

[14] It is also the applicant's position that she was deeply offended that Mr Hartigan did not personally discuss with her the proposed redundancy and alternatives to redundancy (including the possibility of a position at the Onehunga branch).

[15] Ms Worrall accepts Mr Hartigan's evidence that he tried to contact her three times in the final week of her employment. However, it is her position that he should have contacted her before that and by the time he made contact with her on 31 August "*there was nothing he could do*". She accepts she told him that.

[16] On the question of an alternative position being available in Onehunga, Mr Hartigan's evidence was that there was no position available at the time that Ms Worrall was made redundant. He accepted that there had been a reference to an Onehunga branch in a memo put out by the company. It listed branches by division for budgeting and incentive purposes only. That memo, which was dated 8 August 2005, included a branch in Onehunga for the 2005/2006 years. It was Mr Hartigan's evidence that in fact at that time there had only been agreement reached in principle that the company would open a branch at Dressmart in Onehunga. That agreement in principle was subject to the consent of the landlord's board, a whole host of counter-offer requirements of Hannahs, and negotiation of the actual terms and conditions of the lease which would have to be acceptable to Mr Beagley.

[17] Negotiations on the proposal to take space at Dressmart Onehunga continued until 9 December 2005. It was only then that final agreement was reached in respect of the lease. However, by late October Mr Hartigan had received the all-clear from Mr Beagley to set about hiring staff for the new store as Mr Beagley was by then sufficiently confident that agreement would be reached on terms acceptable to him.

[18] It was the evidence of Mr Hartigan and Mr Flack that neither of them knew that Ms Worrall was harbouring a grievance in respect of the company's failure to discuss with her an alternative position at Onehunga. Mr Hartigan's evidence was that until he had confirmation from Mr Beagley that there would indeed be a branch at Onehunga, it would have been speculative and irresponsible of him to mention any position in Onehunga to Ms Worrall. It would have misled her and been completely unfair to her because it might never have eventuated. As events unfolded, there was a gap of over three months from the time Ms Worrall's position was made redundant until a position would have become available for her at Hannahs' Dressmart Onehunga branch.

[19] Mr Hartigan's evidence was that in September 2005 he was rung by Craig Lewis, Sales Manager of No 1 Shoes¹. He gave a very good reference with a strong recommendation to Mr Lewis for Ms Worrall who had applied for a position with that chain of stores.

[20] Nevertheless, when Mr Hartigan was hiring for the Onehunga store, he was mindful of the promise he had given to Ms Worrall that the company would attempt to source suitable alternative positions for her and on 31 October he wrote to Ms Worrall offering her a position at the new store that was to be opened from 9 December 2005. He had previously had discussions with Mr Flack on this and they had agreed that it would not be necessary to interview Ms Worrall for this position. The letter sent to Ms Worrall offering her the position was accompanied by a contract of employment. This means that a position at Onehunga was Ms Worrall's for the taking.

[21] Ms Worrall accepts that she was offered a role at the Onehunga store when it was opened. She told the Authority that she found the offer insulting, the salary for the position was \$28,000 gross (\$5,000 less than she was earning as the Manager at Papakura and the same amount as the position she had occupied five years previously at Manukau city). She

¹ Both companies are owned by Hellabys.

also considered the company had ulterior motives in offering her the position and did so only to mitigate its exposure to her claim.

Legal Principles

[22] The Employment Relations Act 2000 was amended in 2004 by the insertion of a new section 103A:

103A Test of justification

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.

[23] In determining this matter I must make an objective assessment of the employer's actions and weigh those actions against those of ***a fair and reasonable employer ...in all the circumstances ...at the time....*** The s.103A test applies regardless of the reason for the dismissal.

[24] The Court has recently examined the test for justification (*Air New Zealand v Hudson* unreported AC 30/06). It was held there that the effect of s.103A is to separate out the employer's actions (including the decision to dismiss) for evaluation by the Authority or the Court against the specified objective standard of what a fair and reasonable employer would have done in the circumstances. The Court noted that the objects of the Act including the obligation of good faith must inform any objective assessment of what a fair and reasonable employer would do in the circumstances. This was confirmed by the Chief Judge in a recent decision *Simpsons Farms Ltd v Geoffrey Ian Aberhart* AC 52/06 (Unrep) which addressed the application of the principles of good faith in redundancy situations.

Discussion

[25] Ms Worrall does not challenge the genuineness of the commercial decision made by Hannahs to close the Papakura branch of its business. The issue for this determination then is to consider *how* the employer acted towards Ms Worrall in implementing its decision to close the branch.

[26] Ms Worrall has two complaints regarding the process by which her employment was terminated. Firstly, she believes the company should have discussed with her the possibility of an alternative position at Onehunga. Secondly, she was offended that Mr Hartigan did not personally discuss with her the proposed redundancy and alternatives to redundancy (including the possibility of a position at Onehunga branch).

[27] *Simpsons Farms* (cited above) describes the duty to consult as compulsory in such situations. Unfortunately, the fact the branch was closing was presented to NZ management as a fait accompli by Australian management of the company. There was simply no opportunity for consultation with Ms Worrall on the fact the store would close and it would make a nonsense of the duty to consult were employers to be held to meaningless consultation in such circumstances. What Hannahs could do in this situation was to consult with Ms Worrall about alternative positions within the company that might have avoided the need to terminate her employment. The evidence discloses that Mr Flack identified two alternative positions that might be suitable for Ms Worrall and discussed them with her. She declined both jobs as being unsuitable in terms of the travel that would be required by her.

[28] Did the duty to consult Ms Worrall about alternative roles extend to consulting her about a position in Onehunga when there was no certainty about a role in that location? I find not. For consultation to be meaningful (consultation must be meaningful if it is to meet the test of good faith conduct) then consultation on alternatives to redundancy must relate to alternatives about which there is certainty or near certainty. Neither Mr Flack nor Mr Hartigan had any control over the decision to go ahead with an Onehunga outlet and neither were they empowered to make offers of employment in that branch. So uncertain was the position with regard to a future outlet in Onehunga that it did not cross the minds of Mr Flack or Mr Hartigan to consider the future needs of that store when the duty to consult with Ms Worrall arose. If Ms Worrall harboured a wish to work at that store at the time she was being consulted on alternative positions then she had a duty in good faith to raise it with Mr Flack or Mr Hartigan – the duty to be proactive and communicative being a two way duty. That would have led to the company being able to clear up the misunderstanding Ms Worrall had about the availability of a position at Onehunga. In closing on this point it needs to be emphasised that any discussions that might have taken place over positions in Onehunga would only have been to advise that nothing was decided at that time. It would have made no difference to the termination of Ms Worrall's employment on 31 August 2005.

[29] In the event Ms Worrall was consulted about all the realistic alternatives available to avoid redundancy. After she declined the offers made they were reiterated to her and declined once again. I do not consider it a breach of duty that Mr Hartigan did not personally consult with Ms Worrall. Given the length of time they had known each other that would have been a courtesy. Courteous behaviour in employment relationships is to be applauded but cannot be mandated. What was required was consultation with Ms Worrall in relation to her proposed termination for redundancy and this was done.

[30] I note too that the respondent took other reasonable steps in the process leading to and following the termination of Ms Worrall's employment. It is not in dispute that Mr Hartigan did try to make contact with Ms Worrall and he and Mr Cook went to the branch with a view to meeting with her. When the store closed the respondent recognised the contribution of staff (albeit Ms Worrall was not receptive to the respondent's thanks). Further, at the time Ms Worrall's employment was terminated she was paid an ex gratia payment of four weeks pay in recognition of her service to the company. This was in addition to all her contractual entitlements on termination.

[31] When Ms Worrall applied for a new job with No.1 Shoes she was given a strong recommendation by Mr Hartigan despite the fact she did not cite Hannahs as a referee and when a position became available the new Onehunga store she was offered employment at that store. Ms Worrall questions the respondent's motives in making that offer. It was, however, a firm offer without strings and open for her acceptance.

[32] In all the respondent's actions in implementing this redundancy were consistent with what a fair and reasonable employer would have done.

Determination

[33] Ms Worrall's employment was terminated as a result of a genuine redundancy that was implemented fairly. Ms Worrall does not have a personal grievance against her former employer and her claims (including the claim for a penalty for breaches of the duty of good faith) must be denied.

Costs

[34] Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined.

Janet Scott
Member of Employment Relations Authority