

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Tania Wright (applicant)
AND	Resene Paints Limited (respondent)
REPRESENTATIVES	Finn Collins for the applicant Murray French for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Wellington, 8 September 2005
SUBMISSIONS	9 September, 2005
DATE OF DETERMINATION	13 September 2005

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. Ms Tania Wright says she was unjustifiably dismissed by the Company during her absence from work on parental leave – statement of problem (SOP) received on 22 March 2005. She originally claimed reinstatement, as well as compensation for lost wages, an amount to be determined by the Authority for humiliation, etc and costs. During the investigation Ms Wright withdrew her claim for reinstatement.

2. The Company says the termination of Ms Wright's employment was justified in all respects – statement in reply (SIR) received on 6 April 2005.
3. The parties did not settle their employment relationship problem in mediation. Agreement was reached on a one-day investigation in Wellington on 8 September – as it happened less than a half-day was required for the investigation. Witness statements were usefully provided in advance of the investigation. Efforts by the parties during the investigation to settle their problem were unsuccessful. Agreement was reached on an exchange of submissions: because of my finding against the applicant it was not necessary to require submissions from the respondent.

Amended Statement of Problem

4. Until the investigation Ms Wright adhered to her claims that she did not believe her termination was justified for redundancy, that the Company had simply moved somebody else into her role and she had not been properly considered for other roles that might be available including the position vacated by the person now in – as she saw it – her old role.
5. That claim was then substantially amended. By the conclusion of the Authority's investigation, Ms Wright accepted that: no one had moved into her previous position; that the work was not there to substantiate a full-time position; the duties she used to perform that survived a Company restructuring had been distributed to others; and her amended employment relationship problem consisted of the claim that she had not been properly considered for other roles, following the disappearance through a genuine restructuring of her old position.

Background

6. I find that the key facts are largely not in dispute, other than what was discussed at a meeting of Ms Wright, her husband and the Company's managing director, Mr Nick Nightingale, on 23 November 2004.
7. The Company employs around 700 full and part-time staff throughout New Zealand. It develops, manufactures and sells a wide range of paint and protective products through over 50 retail shops and directly to specifiers and applicators.

8. Ms Wright started working for the Company on 16 September 2002: her position was that of head office administrator/PA. Ms Wright largely worked to Mr Nightingale.
9. By letter of 14 October 2003 Ms Wright sought – and was granted – parental leave for a year. It was confirmed that her employment would be kept open during that period. Subsequently it was agreed Ms Wright’s parental leave would start on 2 February 2004.
10. By letter dated 12 October 2004 Mr Nightingale wrote to the applicant,

... in regard to a number of changes within our head office structure and the affect that this might have on the position held by you, which is currently being held open due to you taking Parental Leave.”

(SOP)

11. Some of the changes detailed in the letter included:
 - The relocation of Mr Nightingale’s office, arising out of the change in his position from General Manager to Managing Director, and the consequential diminution of his ongoing requirements for secretarial and administration needs.
 - The national sales manager giving up his additional responsibilities as central regional manager, so as to focus exclusively on his national sales duties, and the appointment of a new and full-time central region manager; and
 - The relocation of the national sales manager to Mr Nightingale’s old office.
12. The letter expressed Mr Nightingale’s proposal to obtain his future secretarial and administration needs from the national sales manager’s PA. If all of these changes were implemented then:

This would mean that the position you hold would be surplus to our needs and need to be disestablished.

13. The letter sought Ms Wright's views on, first, the proposed disestablishment of her position,

including whether you think any other options might exist (and)

Second, assuming your position is disestablished, we need to address what other employment opportunities might exist within Resene that are substantially similar or otherwise suitable for you, assuming you do wish to resume work with us.

14. Consistent with the stated need to address other employment opportunities, Mr Nightingale's letter identified an impending vacancy (that of central region administrator). He said the position needed to be filled promptly and that it had a significant reception and telephone contact component *"quite different from your role"*.
15. Mr Nightingale closed his letter with the appreciation that the detail it contained amounted to *"quite a bit to take in"*, that he had tried to provide the applicant with as much information as possible and that he would appreciate any comments Ms Wright might have, in writing or at a meeting, *"... on the proposed disestablishment of the position held by you, including whether you think any other options might exist, and if this does happen, what other employment opportunities might exist within Resene for you."*
16. As a result of Mr Nightingales' advice and invitation the parties met on 23 November. The parties very much dispute what discussed at that meeting: Ms Wright says she made very clear to Mr Nightingale her willingness to take any employment with the Company.
17. Mr Nightingale disagrees. He relies on a minute he took of the meeting. It was drawn up from memory, he says, shortly after that meeting. It records the following (verbatim):
- *Explained the situation regarding her position, as outlined in my letter.*
 - *TW (the applicant) agreed that it had been spelled out in the letter*

- *NN (Mr Nightingale) asked what her plans were and what she wanted/wished to do*
- *TW (and Peter (applicant's husband)) stated that Tania wanted to come back to work, and would consider part time as well as full time options.*
- *Discussed possibility of "Job Share" with (another employee, X)*
- *NN advised there were two possible jobs*
 - *(X's) role, however the job was described more as the downstairs reception function and less of PS role*
- ***TW stated that she didn't want to 'go backwards' and that she had done reception before and didn't wish to return to it.***
- *Discussed the role with (Y – another Company manager) – a PA function*
- ***TW stated she did not want that role and would not apply for it***
- *Moved on to discuss other functions other than PA secretarial roles.*
- *TW expressed interest in Marketing area*
- *NN stated that I do not know what they do – however there was a lot of data input / envelope stuffing.*
- *NN would discuss with ... (Marketing Manager) later in the week to determine what options were available.*
- *TW noted that she would not be able to start back until the 12 month period as she was/is still breast feeding.*
- *Peter noted that Tania would prefer to work in the Hutt areas due to the ease of childcare arrangements.*

(emphasis added, document 3, SIR)

18. Ms Wright takes issue with some but not all of the respondent's record. In particular, she says she did not reject the two jobs identified by Mr Nightingale. She says she made clear her willingness to do anything, by way of returning to employment with the Company at the end of her parental leave. She says, and Mr Nightingale agrees, that he did not take notes at the time. He says he has excellent recall and the minute was prepared immediately after the meeting. Ms Wright says she took notes but could not produce them.
19. Mr Nightingale says the applicant rejected the two positions specifically offered her, including that of central region administrator. At Ms Wright's request, Mr Nightingale says he made subsequent inquiries in Marketing but it had no positions available for her.
20. By letter dated 3 December Mr Nightingale advised that, with regret and after taking the applicant's views into account, he had decided to disestablish her position. He went on to say:

At our meeting last week we discussed the proposed disestablishment of your position, your circumstances in the context of the parental leave you are currently taking and ... whether any other employment opportunities within Resene might exist.

In ... the context of any other positions that might be available you identified that you were not able to return to work earlier than planned, and thus even if you were interested in any current vacancies you were not in a position to apply for them. You also felt that any reception focused roles would not be attractive to you. Similarly you did not have an interest in the role in our finance department ...

You did indicate that you would like to work in our marketing department ... if a suitable role became available. There is no current vacancy ... and ... my subsequent enquiries ... indicate that any vacancy ... is now unlikely.

As a result of my decision to disestablish your position, and there is no prospect of us being able to appoint you to a position which is vacant and substantially similar to your position, I need to formally provide you with notice of the termination of your employment on the grounds of redundancy.

(SOP)

21. A number of weeks later, and by letter to the Company dated 25 January 2005 (SIR), Ms Wright challenged the Company's decision to disestablish her position: she expressed the view that her position was not redundant and asked the respondent to reconsider and confirm her continued employment.
22. The Company refused. The focus of its 4 February reply, consistent with that of the applicant's complaint, was that Ms Wright's position was surplus by way of a genuine restructuring.

Applicant's Position

23. In closing submissions, counsel for Ms Wright, Mr Finn Collins, says his client's termination was unjustified because the Company failed to provide sufficient information on the two positions that were or were about to become vacant.
24. He also said the respondent had breached its promise that her employment would be kept open during the period of her parental leave and that a similar or like position would be made available on her return and that it failed to put temporary arrangements in place to ensure that the applicant could be appointed on her return from parental leave.
25. Finally, the termination was unjustified because the Company, in reply to an inquiry from Mr Wright, confirmed that his wife could apply for one of the vacant positions.

Respondent's Position

26. Because I find in favour of the respondent's position I am satisfied there is no need for me to set out in summary form its arguments.

Discussion and Findings

27. Consistent with the applicant's amended statement of problem, I am satisfied that the only issue to be determined is a factual matter: did Ms Wright apply for vacancies open to her at a meeting with Mr Nightingale, on 23 November? The parties agree that, if she did, the Company would have unjustifiably dismissed the applicant – in

breach of its obligations under the Parental Leave and Employment Protection Act 1987 – for failing to appoint her to a similar role for which she was entirely suited after having made her original position lawfully redundant while the applicant was on parental leave.

28. I find against Ms Wright's claim that she was not properly considered for other roles for the following reasons.
29. During the Authority's investigation Ms Wright agreed she used the term "*didn't want to go backwards*" (also quoted in Mr Nightingale's minute, SIR) during her meeting with Mr Nightingale, but – she says – not in regard to the jobs being offered to her. Peter Wright agreed his wife had used the term: he also agreed with the Authority's suggestion that Mr Nightingale could have understood his wife was rejecting a job offer by use of that term.
30. Ms Wright denies rejecting the second job offer, a PA role with another Company manager. Mr Nightingale says his record accurately reflects the applicant's response to his job offers. In respect of the second job offered Ms Wright, he agrees he said to the applicant that he did not expect she would want it as he anticipated Ms Wright and the other Company manager might clash, because of their similar, firm personalities. But, he says, the position was available for the applicant if she wanted it. He says Ms Wright expressed her preference for work in the Marketing area: Mr Nightingale undertook to see if any employment was available. As it happened, there was not and he set out the result of his inquiry in his letter of 3 December.
31. I also prefer Mr Nightingale's account of the 23 November meeting because the Authority's investigation disclosed no evidence of animus on the Company's part, or of it wanting to be rid of Ms Wright or of it restructuring so as to be rid of her, or of Mr Nightingale deliberately blocking the applicant's return. Indeed, I find the Company at all times met its obligations to fully and fairly advise and consult with the applicant.
32. I find against Ms Wright's recollection of the meeting because of errors held to firmly by the applicant in respect of the overall restructuring, as set out in both her statement of problem and her first witness statement: in the former the applicant asserts that the Company "*simply moved somebody else into my role*" (par 2.15). In the

latter she claims that another Company employee *“had taken over most of the functions of my previous position”* (par 13. c. of applicant’s first witness statement). Neither claim was correct. Furthermore, there has never been any basis to assert these claims: from the outset they flew in the face of all available evidence. Ms Wright did not concede, until the Authority’s investigation, that she was wrong on both counts and only then with some reluctance notwithstanding the weight of evidence against her claims: I am satisfied she is similarly in error in respect of this disputed matter.

33. The applicant was similarly very reluctant to accept she was in error in claiming that the national sales manager *“was moved up into effectively Nick Nightingale’s General Manager position”* (par 8 of her first witness statement) despite accepting that – again – her claim could not withstand the weight of evidence against it, that the Company had consistently set out its restructuring detail from as early as its letter of 12 October 2004 and that she had no evidence to challenge its evidence describing its restructure. It was this mistaken view that caused Ms Wright to make the equally mistaken claim that someone else had simply moved into her old position.
34. Overall, Ms Wright was reluctant to accept any evidence that did not support her firm views despite the objective strength invariably enjoyed by that evidence.
35. I am satisfied that Ms Wright was, at the end of the 23 November meeting and in response to an inquiry from her husband, assured she could apply for one of the vacant positions should she – from Mr Nightingale’s perspective – elect to change her mind and withdraw her then rejection of the same.
36. Consistent with the parties’ recollection of the 23 November meeting, Mr Nightingale did inquire into whether any vacancies existed in Marketing: as his letter of 3 December makes clear, there were none nor were there any elsewhere (other than those already refused by Ms Wright) that the Company could offer the applicant.
37. Finally, Ms Wright could not explain why she failed to promptly respond to Mr Nightingale’s letter of 3 December, in respect of what was – from her position – a serious error, that she had refused one of the two positions offered to her in the 23 November meeting. It was abundantly open to her (and to Mr Wright) to advise the Company that it was seriously mistaken, that it had not recorded her position

correctly at the 23 November meeting and that in fact she did want to take up one of the vacant positions. There is no reason to regard that lost opportunity to put the record right as anything other than a matter of a prompt telephone message or letter, from the applicant to the respondent.

38. In the absence of any evidence of a sustained and hostile campaign by the Company to be rid of Ms Wright and, in the face of her persistent but wrong view that her position remained and someone else had been moved into it, I find, on a balance of probabilities basis, that the applicant did not do so because her response reflected her wish throughout not to take up any of the vacancies then open to her.

Determination

39. For the reasons set out above I find in against the claim by Ms Tania Wright that she was unjustifiably dismissed, in breach of the Parental Leave and Employment Protection Act 1987, by the respondent, Resene Paints Limited.
40. The parties are to attempt to reach agreement on the matter of costs failing which leave is reserved for the matter to be put to the Authority.

Denis Asher

Member of Employment Relations Authority