**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND**

AA 279/07
5074367

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| | BETWEEN | CORINNE ANDREWS<br>Applicant |
| | AND | MEN AT WORK BUILDING SOLUTIONS LIMITED<br>Respondent |

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| Member of Authority: | Robin Arthur |
| Representatives: | John Schlooz for Applicant<br>Clive Bennett for Respondent |
| Investigation Meeting: | 21 August 2007 at Auckland |
| Determination: | 10 September 2007 |

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## DETERMINATION OF THE AUTHORITY

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### Employment Relationship Problem

[1] The Applicant says her dismissal for redundancy on 17 October 2006 was not genuine because her position was advertised two days after she finished work. She acknowledges she was asked earlier what could be done after her workload was reduced by the introduction of new technology, but says the Respondent's directors did not properly consult her about the prospect of redundancy or offer her an alternative part-time position that was created. She seeks lost wages, compensation for hurt and loss of dignity, and her costs.

[2] The Respondent says new digital devices and software reduced the administrative work previously done by the Applicant. Its directors discussed this with her on 5 October 2006 and asked for her suggestions about restructuring. It says the Applicant was asked again on 12 October but had no suggestions. On 16 October she was told there were no viable alternatives to making her position redundant but

she was told of an alternative position – at a lower pay rate for fewer hours – in which she expressed no interest.

[3] The Applicant was given one month's paid notice and an additional month's pay as well as offered outplacement counselling and a reference. The Respondent says its decision was for genuine commercial reasons and was carried out in a fair way after consulting the Applicant.

**The investigation**

[4] This matter was not resolved in prior mediation. For the purposes of investigation I had written witness statements from the Applicant, the Respondent's director Mark Armstrong and administrative assistant, Angela Skeggs. A Respondent director Michael Anscombe also attended the investigation meeting where all witnesses answered questions from the Authority and additional questions from the parties' representatives. The representatives provided oral closing arguments.

**The issues**

[5] The issues for resolution are:

(i) Was the decision to make the position redundant made for genuine commercial reasons, including particularly whether:

(a) there was a drop in the amount of work; and

(b) the part-time job was a sufficiently different role?

(ii) Was the Applicant properly consulted about the prospect of redundancy and then how to minimise its effect on her, including particularly:

(a) was there an opportunity for feedback after 5 October and before the 16 October announcement of the redundancy decision; and

(b) was the Applicant offered the part-time job?

(iii) If a personal grievance were established and remedies required, had the Applicant done enough to minimise her losses?

**Legal framework**

[6] The Applicant was employed by the Respondent as an office administrator from 17 May 2005. In February 2006 the present directors and shareholders bought the business and the Applicant's employment continued on the same basis.

[7] Her written employment agreement does not define redundancy but includes a provision that:

> *If the employee's position becomes redundant no entitlement shall accrue to the employee in respect of termination of employment for redundancy other than one-month notice provision.*

[8] The agreement provides either party may terminate the employment by giving by one month's notice in writing.

[9] Under s103A of the Employment Relations Act 2000 ("the Act"), the Respondent's decision to make the Applicant's position redundant, and how it went about dealing with her over any proposal, decision and consequences of redundancy, is justifiable if its actions were what a fair and reasonable employer would have done in all the circumstances at the time of the decision and dealings around it.

[10] The application of s103A to personal grievances involving redundancy was described in this way in *Simpsons Farms Ltd v Aberhart* (unreported, EC Auckland, ARC13/06, 14 September 2006):

> *[65] … the statutory obligations of good faith dealing and, in particular, those under s4(1A)(c) inform the decision under s103A about how the employer acted. A fair and reasonable employer must, if challenged, be able to establish that he or she or it has complied with the statutory obligations of good faith dealing in s4 including as to consultation because a fair and reasonable employer will comply with the law.*
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> …
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> *[67] … so long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant is for the employer to make and not for the Authority or the Court, even under s103A.*

[11] So the Authority must be satisfied on two general points – whether the business decision to make a position redundant in this case was made genuinely and not for ulterior motives; and whether the Respondent acted in a fair and open way in

carrying out that decision – particularly did it consult properly about the proposal to make the Applicant's position redundant and otherwise act in a way that was not likely to mislead or deceive her, that is in good faith?

[12] The Authority does not substitute its judgment for that of an employer as to whether there are genuine commercial reasons for a redundancy. As stated by the Court of Appeal in *GNH Hale & Sons Ltd v Wellington Caretakers and Cleaners Union* [1990] 2 NZILR 1079:

> *An employer is entitled to make his business more efficient, as for example by automation, 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 the right to continued employment if the business can be run more efficiently without him. The personal grievance provisions … should not be treated as derogating from the rights of employers to make management decisions genuinely on such grounds.*

[13] Rather, as stated by the Court of Appeal in *Aoraki Corporation Ltd v McGavin* [1998] 1 ERNZ 601:

> *Where it is decided as a matter of commercial judgement that there are too many employees in the particular area or overall, it is for the employer as a matter of business judgement to decide on the strategy to be adopted in the restructuring exercise and what position or positions should be dispensed with in the implementation of that strategy. …*

**Genuineness of the redundancy**

[14] The Applicant did not dispute the evidence of Mr Armstrong that the introduction of a system of Personal Digital Assistants ("PDAs") substantially reduced the previous administrative work she had done in processing job sheets and invoices. The Respondent's technicians could now get work instructions and file work sheets electronically. Their work notes, previously typed into the system by the Applicant, were now automatically posted into the Respondent's electronic records.

[15] The Applicant accepted that, once the new system was introduced, she often finished her allocated work in the first half of the day and sometimes read a book for the remainder of her shift.

[16] Administrative work was also done by Ms Skeggs, mostly under the direction of the company accountant. She worked 6 hours a day for 5 days a week.

[17] Mr Armstrong and Mr Anscombe met separately with both women on 5 October to discuss workloads and positions in the organisation. The Applicant denies that the word "redundancy" was used but accepts that the topic of the meeting was notified to her in advance as being about restructuring. She was also told she could bring a representative to the meeting with her. She recalls being asked for any ideas that she had about dealing with the problem of reduced workload following the introduction of the PDAs.

[18] There is a dispute in the evidence about whether Mr Armstrong and Mr Anscombe met with the Applicant again on 12 October – about which more will be said below. Shortly after that date Mr Armstrong and Mr Anscombe either decided or confirmed their view that their business needs could be met by a part-time office administrative assistant in place of the full time position held by the Applicant.

[19] The directors' evidence was that they did subsequently employ a part-time office worker in the period from November 2006 to January 2007. However, when that employee left in January, they again reassessed the work and did not make another permanent appointment to that role. Rather a casual worker is engaged from time to time when needed.

[20] In light of that evidence and the commercial discretion reserved to employers – as stated in the *Hale* and *Aoraki* cases – I find that the Respondent's decision to disestablish the Applicant's position and retain Ms Skeggs' position was one it was entitled to take as a matter of business judgement.

[21] From the evidence available to me I do not accept that the part-time role created subsequently was sufficiently similar to cast doubt on the decision to substitute that position for the previously full-time position of the Applicant, although there was some overlap of the tasks required. Neither does the suggestion that Ms Skeggs may now do some of those tasks negate the genuineness of the Respondent's decision that the Applicant's full-time position was surplus to its requirements and that the business could run more efficiently or cost effectively without it.

**Consultation**

[22] The directors' evidence left me in some doubt that I could confidently say the Respondent did everything a fair and reasonable employer would do in the circumstances to meet its statutory good faith obligations of consultation about

restructuring and prospective redundancy – that is the combined obligations under sections 103A and 4(4)(c), (d) and (e) of the Act.

[23] Mr Armstrong was confident that he had met with the Applicant on 5 and 12 October to discuss restructuring and the prospect of redundancy. The Applicant denies that there was a meeting on 12 October. Mr Armstrong told me that he was sure that the 12 October meeting took place because there were "diary notes". However, on questioning, it transpired that the diary notes he referred to were electronic diary notes made by Mr Anscombe. Mr Anscombe also says there was a meeting on 12 October but because the Applicant's did not say anything of note, his electronic diary note did not record anything from the Applicant on that date. No copy of the document or record referred to was supplied to me, from which I infer it was either not relevant or would not have assisted me in taking a different view.

[24] These are more than minor inconsistencies. The employer is obliged to ensure it consults properly, fully and fairly. A fair and reasonable employer, where called upon through a former employee's grievance application to justify a dismissal for redundancy, needs to be able to show that it has taken the necessary steps of consultation. That requirement could normally be shown to have been meet by producing a basic 'paper trail', which need not be exhaustive or extensive but should be available if needed. In this case the Respondent is not able to establish that an important feed-back meeting was held with the Applicant. It is important because, to show it met the statutory requirements of consultation, it needed to confirm it advised the Applicant of the prospect of change, and then provided an opportunity for her to think about and provide comments to be considered before a final decision was made. In this case the Respondent cannot positively confirm that it did so, other than by the unaided memories of the directors, whose recall I have no reason to favour over that of the Applicant given that the obligation of consultation and justification lies – under the Act – with the employer and not the worker.

[25] Mr Armstrong thinks he remembers that while meeting on 12 October the Applicant suggested one option would be to give her some of the work then done by Ms Skeggs. The Applicant accepts that she did make that comment but insists it was made when she was first asked for her comments on 5 October. While I accept the Respondent was entitled to, as a business judgement, resolve that it was more effective to maintain Ms Skeggs' part-time position and not redistribute work to the

Applicant's position, it was obliged to consult with the Applicant and should be able to show that it has done so and considered any suggestions that she made. On this aspect at least, it has failed to do so.

**Implementation of redundancy**

[26] Having resolved to disestablish the Applicant's position, the directors met with her on 16 October 2006 to tell her of the decision. Having spoken to her together, Mr Armstrong then left Mr Anscombe to go through what he called "the finer details". Mr Anscombe told the Applicant that she would be paid one month's notice and an additional month's pay, although her employment agreement did not require the Respondent to make that additional payment. The Applicant was also told that she would be provided with a positive reference and offered the use of outplacement counselling services at the company's cost to help her search for another job.

[27] However, it is not clear that all the arrangements for the termination of the Applicant's employment were clearly communicated to her at that stage. It may be that they were, but that she was too surprised by the decision to fully understand them. Mr Anscombe, in his evidence, noted that the discussion was not long and that he "*could see [the Applicant] was taken aback by our decision*".

[28] The lack of clarity or understanding became apparent the next day when the Applicant turned up for work at the usual time. Mr Anscombe called her into his office and explained – perhaps for a second time – that she was being paid for her notice period but was not required to attend work. The Applicant says that she "*just went*" at that point but felt "*upset*".

**Determination**

[29] For the reasons given, I find that the Respondent's decision to make the Applicant's position redundant was made genuinely, but how it carried out that decision was less than what a fair and reasonable employer would have done in all the circumstances in two important aspects. Firstly, it has not established that it did carry out the basic process of consultation it was obliged to carry out so that it is not clear that the Applicant did, with a real sense that her job was 'on the line', have a full opportunity to make suggestions for the directors to consider in making their restructuring decisions. Secondly, the Respondent missed an important step in minimising the impact on the Applicant of terminating her employment, which in the

circumstance of a redundancy was on a no-fault basis. The arrangements for paid notice – with no requirement for the Applicant to attend work after the end of work on 16 October – were not clearly enough communicated to her. That resulted in her turning up for work the next day, apparently oblivious, and then promptly being asked to leave. The Respondent, I accept, did not want her, or other staff, to feel uncomfortable about the change, but, as it turned out, effected her departure in an abrupt way which left her feeling embarrassed and upset.

[30] It is to the Respondent's credit that it did make provisions for what was in effect eight weeks paid notice, twice the amount of the Applicant's contractual entitlement. It also provided the promised positive reference and had offered to pay for outplacement counselling, an offer that the Applicant did not take up. She did not get another job until late January 2007, although from copies of emails provided it appears that she quite promptly began searching for a new job in October 2006. Part of that delay may be explained by a pre-arranged period of leave and overseas travel she took for important family reasons in late December 2006 and early January 2007.

[31] The Applicant says that she was particularly humiliated by seeing the advertisement for a part-time job for the Respondent in a local newspaper only two days after the termination of her employment. She describes that advertisement as being for "*my job*". She also says that she was not offered the opportunity to apply for that job by the Respondent prior to the termination of her employment. However I prefer the Respondent's witnesses' evidence on this point – that the part-time job was different from the Applicant's previous full-time position and that she was told about the part-time position and the opportunity to apply for it prior to the termination of her employment. Her own written statement confirms that she was told by the directors that they would be creating a new position at a reduced hourly rate and for 4-5 hours daily.

**Remedies**

[32] Having accepted the redundancy was for genuine commercial reasons, the Applicant cannot be awarded lost wages.

[33] I have not accepted that the Applicant was denied the opportunity to apply for the new part-time position or could reasonably have been shocked by seeing that position advertised a few days later.

[34] Accordingly, compensation for any hurt and humiliation arising from the circumstances of the redundancy is limited to the apparent failure to fully consult the Applicant and to clearly advise her about the arrangements being made for the end of her employment. She cannot be awarded compensation for the loss of the job itself, only for those unjustified aspects of the manner of making and implementing the decision.[1] In all the circumstances I consider an award of $1,500 sufficient to mark the Respondent's errors in how it carried out the redundancy.

[35] The Respondent is ordered to pay to the Applicant the sum of $1,500 (without deduction) under s123(1)(c)(i) of the Employment Relations Act 2000.

**Costs**

[36] The parties are encouraged to resolve between themselves any issue of costs for the half-day investigation meeting. If they are unable to do so, the Applicant may, within 28 days of the date of this determination, apply for the Authority to resolve any issue of costs. The Respondent will have 14 days to reply after the lodging of any such application. No application on costs will be considered outside of this timetable.

Robin Arthur
Member of the Employment Relations Authority

[1] *Aoraki Corporation Limited v McGavin* [1998] 1 ERNZ 601, 621 and 627 (CA).