

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 313
5374262

BETWEEN CATHERINE BECKMAN
Applicant

A N D ABDUL HUSSEIN t/a
HAIRPRO NEW LYNN
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: May Moncur, Advocate for Applicant
Moira McNab, Counsel for Respondent

Investigation Meeting: 22 August 2012

Date of Determination: 10 September 2012

DETERMINATION OF THE AUTHORITY

- A. The reduction in Ms Catherine Beckman's hours of work by Mr Abdul Hussein t/a Hairpro New Lynn did not constitute unjustifiable disadvantage.**
- B. Ms Beckman's dismissal for redundancy was unjustified.**
- C. Mr Hussein is ordered to pay Ms Beckman the sum of \$2500 distress compensation.**

Employment relationship problem

[1] The applicant, Ms Catherine Beckman, claims she was unjustifiably disadvantaged and subsequently unjustifiably dismissed by the respondent, Abdul Hussein trading as Hairpro New Lynn.

[2] Specifically, Ms Beckman claims:

- She was unjustifiably disadvantaged in that her hours of work were reduced and some of those hours were given to part-time employees;
- The reduction in her hours of work was undertaken by Mr Hussein in an unfair manner;
- Her dismissal was unjustifiable in that the “redundancy” was not genuine and her hours of work were given to part-time employees;
- The procedure undertaken by Mr Hussein in dismissing her for redundancy was not a fair and reasonable process.

[3] Ms Beckman claims the real reason for the reduction in her hours and subsequent dismissal was because she had periods of time off work for sickness.

[4] Mr Hussein denies that Ms Beckman was unjustifiably disadvantaged and denies that her subsequent dismissal was unjustifiable. Mr Hussein claims due to a serious financial situation facing the Hairpro business he had to reduce costs, one such cost being Ms Beckman’s salary. Mr Hussein says that the reduction in Ms Beckman’s hours and her subsequent dismissal were for genuine business reasons and a fair process was undertaken.

Issues

[5] The following issues require determination:

- a. Whether Ms Beckman’s hours were reduced for genuine business reasons, or in response to Ms Beckman taking periods of time off for illness;
- b. Whether the process undertaken by Mr Hussein in reducing Ms Beckman’s hours was a fair and reasonable one;
- c. Whether Ms Beckman’s dismissal was for genuine business reasons or in response to Ms Beckman taking periods of time off work for illness;
- d. Whether Mr Hussein followed a fair and reasonable procedure in dismissing Ms Beckman.

Issue One***Were Ms Beckman's hours reduced by Mr Hussein for genuine business reasons or in response to Ms Beckman taking periods of time off work for illness?***

[6] Mr Hussein and his wife, Mrs Raksha Hussein own and operate a small shampoo shop, Hairpro New Lynn from premises in Lynn Mall, New Lynn. Hairpro stocks and sells shampoo and hair products. Mr and Mrs Hussein also own a courier round.

[7] Mr Hussein mainly works in the courier business and is rarely at the Hairpro shop. However, Mr Hussein is responsible for the overall management of Hairpro including decisions regarding the negotiation of the lease of the Hairpro premises in Lynn Mall and its fit-out, staff matters including employment agreements and any disciplinary issues. Mrs Hussein is in charge of the day-to-day running of Hairpro, ordering stock, sales and rostering and training staff.

[8] Ms Beckman commenced employment with Hairpro on 1 November 2010 in the position of retail assistant, reporting to Mrs Hussein.

[9] Mr Hussein and Ms Beckman both signed a written employment agreement on 11 and 13 January 2012 respectively. Under the employment agreement, Ms Beckman's hours of work were specified as being 25-32 per week between the hours of 9am – 6pm. Ms Beckman's hourly rate was \$14 and she actually worked 35 hours a week from Monday to Friday. There were 2 or 3 other parttime employees who worked evenings and weekends. It was Mrs Hussein and Ms Beckman who mainly worked at the Hairpro shop.

[10] Up until January 2012, the employment relationship was relatively smooth apart from on one occasion in May 2011 when Ms Beckman was issued with a written warning by Mr Hussein. The matter was minor and quickly resolved.

[11] Mrs Hussein and Ms Beckman enjoyed a warm and friendly working relationship and regularly shared personal information. Mrs Hussein described her relationship with Ms Beckman and the other staff as being very open and she was more like a friend than a boss.

[12] On 31 August 2011, Ms Beckman was hospitalised and spent the next five days in hospital. It was at this point Ms Beckman says her relationship with Mrs

Hussein changed. Ms Beckman says Mrs Hussein was no longer friendly, the work environment was not good to work in and she felt Mr and Mrs Hussein wanted her to leave because she had been away sick.

[13] In her witness statement Ms Beckman says while she was in hospital Mrs Hussein rang or texted her:

Every day asking if I could come in and complained that this was unacceptable. I felt under a lot of pressure, I worried about my job and started to worry about the security of my job.

[14] After being discharged from hospital Ms Beckman says she received an abusive phone call from Mr Hussein overheard by her mother, Ms Linda Sampson and her mother's former partner, Mr Rob Dragicevich, questioning her about her medical condition. After this phone call Ms Beckman says she felt she could do nothing right at work, that she was picked on and cited receiving a warning for going to the toilet as an example of this treatment.

[15] Ms Beckman's evidence regarding the text messages, the phone call from Mr Hussein and the way in which she was treated when she returned to work was inconsistent and contradictory.

[16] I have reviewed the texts disclosed to the Authority which cover the period Ms Beckman was in hospital and following her discharge. They do not support Ms Beckman's claims that she was under pressure to leave and that she was picked on. Mrs Hussein's texts to Ms Beckman were those of a concerned friend.

[17] I prefer Mr Hussein's evidence regarding the phone call made by him. This phone call occurred on 5 January 2012, some 4 months after Ms Beckman had been discharged from hospital. Ms Beckman had been off work sick for four days which accords with the records of Ms Beckman's sick leave attached to Mrs Hussein's witness statement. Mr Hussein's call was not abusive, he rang Ms Beckman to find out what was wrong as he was concerned she may have to go back to hospital. Ms Beckman took exception to Mr Hussein's questions and refused to answer.

[18] The warning Ms Beckman referred to as an example of the treatment she was receiving when she returned to work was the warning issued in May 2011, many months earlier.

[19] It is my finding that Mr and Mrs Hussein were concerned for Ms Beckman when she was hospitalised in late August 2011 and wanted her to recover quickly. I find that Mr and Mrs Hussein did not change their attitude towards Ms Beckman when she was in hospital, and, when she returned to work did not act in a manner designed to make her leave.

[20] During 2011, business conditions were difficult and Hairpro suffered losses. Mr and Mrs Hussein had a meeting in September 2011 with Hairpro's accountants, Menon & Associates (2011) Ltd (Menon) about the situation. In a letter to Mr and Mrs Hussein dated 28 September 2011, Biju Surendran, Director of Menon summarises Hairpro's *dire* financial situation, which he noted was compounded by the requirement of the mall operator that they undertake renovations and the impending rent review which was likely to result in an increase in rental. The advice to Mr and Mrs Hussein was clear and to the point that they needed to take drastic steps to reduce Hairpro's costs and increase sales.

[21] In the months following this meeting in September 2011, Mrs Hussein talked to Ms Beckman and the other staff about the difficult retail environment and that shampoo shops in other malls including one in Henderson had had been forced to close down.

[22] On 27 December 2011, after reviewing how sales were tracking, Mr Hussein says he went to Hairpro to talk to Ms Beckman who was the main employee about sales for December. Mr Hussein says he explained to Ms Beckman that the business was not doing well and costs had to be reduced moving forward. There was no discussion at that time about measures to cut costs, just that there needed to be cost reductions.

[23] The next meeting with Ms Beckman about the state of the business was on 13 January 2012. Mr Hussein arranged to come in to Hairpro and noted in the shop diary a meeting with Ms Beckman on 13 January 2012 about her work hours.

[24] Mr Hussein and Ms Beckman went for a coffee in the nearby foodcourt. They talked about the business, that sales were down and other shops had closed. Mr Hussein says he talked with Ms Beckman about the options for her. These would be either to reduce her hours or Mrs Hussein would take over Ms Beckman's hours which would mean redundancy. Mr Hussein says he told Ms Beckman that he

thought reducing her hours was the option and that if changes were not made they would be out of business. Mr Hussein says he explained to Ms Beckman that redundancy was highly likely but they would see how it went with reduced hours. Mr Hussein says Ms Beckman listened and was understanding of the situation. Ms Beckman was due to go on holiday to Australia where her Father lives and told Mr Hussein she would see what opportunities there may be there. Mr Hussein prepared a letter confirming that Ms Beckman's hours were to reduce. Mrs Hussein gave this letter to Ms Beckman the following Monday 16 January 2012.

[25] Ms Beckman denies having any meetings with Mr Hussein on 27 December 2011 or 13 January 2012 to discuss the business and options moving forward and denies talking about job opportunities in Australia. Ms Beckman says the first she heard that her hours of work were to be reduced was on 16 January 2012 when a letter was left on her bag by Mrs Hussein.

[26] I prefer Mr Hussein's evidence and accept that these meetings did occur. I find Ms Beckman was aware that her hours of work were to reduce to make the cost savings needed to save the business.

[27] On 16 January 2012, Ms Beckman received the letter signed by Mr Hussein which stated:

As you are aware it has been a very challenging past 12 months in retailing and it has been forecasted to get even tougher in 2012. With a lot of consideration, I am forced to make this decision to decrease your hours of employment with Hairpro. Please take this as your formal notice, that as of two weeks from the above date is your new working hours....

[28] The reduction in hours took effect from the end of January 2012. Mrs Hussein says that she and Ms Beckman talked about the letter the following day and Ms Beckman understood that her hours needed to be reduced and talked about picking up other work to make up the time.

[29] The Court of Appeal in *GN Hale and Son Limited v Wellington Caretakers IUOW*¹ clarified that:

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

¹ [1991] 1 NZLR 151

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 without him.

The onus of establishing that there were genuine commercial reasons for making cost-saving steps, rests upon the employer.

[30] I determine that Mr Hussein had genuine commercial reasons for taking steps to reduce costs which included reducing Ms Beckman's hours of work to secure such cost savings. The reduction in hours was not in response to Ms Beckman taking periods of time off for illness.

Issue Two

Was the process undertaken by Mr Hussein in reducing Ms Beckman's hours a fair and reasonable one?

[31] I have made a finding that Ms Beckman was aware of Hairpro's financial difficulties and that there were meetings held with her to discuss how savings could be made. Those discussions included exploring options to reduce Ms Beckman's hours or make her position redundant. Following the meeting on 13 January 2012, Mr Hussein wrote a letter specifying that Ms Beckman's hours were to reduce and giving her two weeks' notice. Mrs Hussein left an envelope containing the letter on Ms Beckman's bag and invited discussion with her about it. There was discussion the following day at which time Ms Beckman indicated she would get work elsewhere to make up the hours.

[32] At the meeting on 13 January 2012, Ms Beckman was given an opportunity to discuss the proposal that her hours reduce. This was the option most favoured by Mr Hussein and avoided a redundancy situation while he considered if the costs savings were sufficient. The letter on 16 January 2012 from Mr Hussein confirmed the outcome of the discussion that Ms Beckman's hours were to reduce effective from late January 2012 in order to cut costs.

[33] I find that the reduction in hours was carried out in a fair manner by Mr Hussein. Ms Beckman was not unjustifiably disadvantaged in her employment.

Issue Three

Was Ms Beckman's dismissal for genuine business reasons or in response to Ms Beckman taking periods of time off work for illness.

[34] The Employment Court in *Simpsons Farms Limited v Aberhart*² observed³:

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 section 103A.

[35] I have already found that Mr Hussein had genuine commercial reasons for reducing Ms Beckman's hours of employment. For the same reasons, I find that Mr Hussein had genuine commercial reasons for making her position redundant. This was not an exercise manufactured in order to remove Ms Beckman because she had been taking sick leave. Rather, it was a decision based on commercial realities being faced by the business.

[36] Ms Beckman claims that after her dismissal her job was being done by other employees. I do not accept this to be the case. Mrs Hussein took over Ms Beckman's hours in order to save the business the cost of Ms Beckman's wage. When Ms Hussein needed cover in the shop, one of the part time employees filled in.

Issue Four

Did Mr Hussein follow a fair procedure in dismissing Ms Beckman?

[37] Ms Beckman went on holiday in January 2012 and says when she returned on 14 February she received a letter from Mr Hussein terminating her employment on the grounds of redundancy. The letter was dated 13 February 2012. During the time Ms Beckman was on holiday, Mrs Hussein did the work that Ms Beckman normally did. Mr and Mrs Hussein came to the view that much needed cost-savings could be made by making Ms Beckman's role redundant and for Mrs Hussein to take over her role in its entirety. This would achieve the drastic cost savings needed to save Hairpro from closing down.

[38] Section 103A of the Act, as amended, sets out the test of justification:

Section 103A – Test of justification

² [2006] 1 ERNZ 825

³ At para.[67]

- (1) *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 applying the test in subsection (2).*
- (2) *The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[39] Section 103A(3) sets out a number of factors to be considered by the Authority or Court in applying the test in (2). Other provisions of the Act govern questions of justification for dismissal and, in particular, by reason of redundancy. Section 4 of the Act addresses the requirement for parties to an employment relationship to deal with each other in good faith. Section 4(1A)(c) in particular is relevant for a redundancy situation and 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 an employee to provide to the employee 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 a decision is made.*

Section 4(1A)(c)(i) and (ii).

[40] In a redundancy situation a fair and reasonable employer must, if challenged, be able to establish that he or she has complied with these statutory obligations in good faith dealing in section 4 of the Act.⁴

[41] I find that Mr Hussein did not adequately comply with these statutory obligations imposed on him by the Act.

[42] Ms Beckman had no opportunity to turn her mind to or discuss redundancy with Mr Hussein, the decision had been made by Mr and Mrs Hussein while Ms Beckman was on holiday and without any input from her. There was a discussion with Ms Beckman on 27 December 2011 and another on 13 January 2012 about the need to take cost saving measures which led to the reduction of her hours of work on 16 January 2012. At the meeting on 13 January 2012 Mr Hussein informed Ms Beckman

⁴ Ibid at para.[40]

that redundancy was likely but wished to introduce the reduction in her hours as a cost saving measure first.

[43] There was no focussed discussion with Ms Beckman after the meeting on 13 January 2012 about her continued employment at Hairpro. No information was provided to Ms Beckman about the effectiveness of the cost saving measures implemented and there was no consultation with Ms Beckman before the decision to make her position redundant was made. Mrs Hussein was unable due to time constraints to talk with Ms Beckman about the letter, it was left in her locker. Ms Beckman quite rightly felt aggrieved by this treatment.

[44] I find that Mr Hussein did not carry out a fair process in dismissing Ms Beckman. Ms Beckman's dismissal for redundancy was procedurally unjustified.

Remedies

[45] Having found Ms Beckman has a personal grievance, s124 of the Act requires me to consider the extent to which her actions contributed towards the situation that gave rise to her personal grievance, and if required, reduce the remedies accordingly. I find Ms Beckman did not engage in conduct requiring a reduction in remedies.

[46] Ms Beckman's position at Hairpro was genuinely made redundant due to Hairpro's financial situation. As Ms Beckman's role no longer existed following her dismissal she is not entitled to reimbursement of wages lost.

[47] Ms Beckman is entitled to distress compensation which I award at a level of \$2500. I believe this amount is appropriate to compensate Ms Beckman for the hurt, humiliation and distress suffered as a result of the unfair procedure undertaken by Mr Hussein when terminating her employment for redundancy.

Summary

[48] The reduction in Ms Beckman's hours of work did not constitute unjustifiable action by Mr Hussein therefore her employment was not affected to her disadvantage.

[49] Ms Beckman's dismissal on the grounds of redundancy was procedurally unjustified.

[50] Mr Hussein is ordered to pay Ms Beckman \$2500 under s123 (1)(c)(i) of the Act as compensation for the humiliation, loss of dignity, and injury to feelings she has suffered as a result of her dismissal.

Costs

[51] Ms Beckman was successful in respect of one of the employment relationship problems brought and is entitled to a contribution to her actual costs, provided these have been incurred. The parties are encouraged to agree costs themselves. If they are unable to do so, Ms Beckman has 14 days within which to file a costs memorandum, and Mr Hussein has 14 days within which to reply.

[52] Proof that costs have actually been incurred will be required in support of a costs application. The normal daily tariff applied by the Authority is \$3500 which will be adjusted to reflect the particular circumstances of the case once submissions are received.

Anna Fitzgibbon

Member of the Employment Relations Authority