New Zealand Employment Relations Authority Decisions

Brake v Grace Team Accounting Limited AA409/10 (Auckland) [2010] NZERA 733 (13 September 2010)

Last Updated: 11 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

Attention is drawn to the non-publication orders in paragraphs [51] and [52]

AA 409/10 5305771

BETWEEN JUDITH BRAKE

Applicant

AND GRACE TEAM

ACCOUNTING LIMITED

Respondent

Member of Authority: Representatives:

Investigation Meeting: Submissions Received Determination:

Alastair Dumbleton

Warwick Reid, advocate for Applicant Wendy Macphail, advocate for Respondent

19 and 20 July 2010
10 and 16 August 2010
13 September 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mrs Judith Brake has applied to have the Authority investigate her dismissal by the respondent Grace Team Accounting Ltd and for it to determine the merits of her complaints arising from that action.

[2] The parties have been unable to resolve the problem by mediation.

[3] As the investigation progressed from lodging the application through the investigation meeting and to the presentation of final submissions, the issues and the nature of the employment relationship problem underwent some refinement. It is now necessary for this determination to address only the issue of unjustified dismissal, which in closing submissions made by Mr Warwick Reid on behalf of Mrs Brake was identified as being the sole claim being pursued by her.

[4] To remedy her personal grievance Mrs Brake seeks orders from the Authority for payment of lost wages and compensation under s 123 and s 128 of the Employment Relations Act 2000. Reinstatement is not sought.

[5] Mrs Brake has worked in accountancy for about 24 years. In September 2009 she resigned from KPMG, where she had worked for over eight years, upon accepting an offer of employment with Grace Team Accounting Ltd (GTA). This was a two principal practice which employed a number of accountants and support staff. She began working full time on 5 October

2009 in the position of Senior Accountant. Six months later on 14 April 2010 she was asked to attend a meeting with the firm's principals Mr Lindsay Grace and Mr Michael Grace. They discussed restructuring the accountancy business and raised as a possibility the disestablishment of Mrs Brake's position as part of that exercise.

[6] Mrs Brake was asked to attend another meeting on 19 April at which she would hear more details and have an opportunity to put forward any comments and suggestions she might have in response to restructuring proposals.

[7] Further meetings took place between the Graces, Mrs Brake and Mr Reid her representative. They culminated on 30 April 2010 in Mrs Brake being told that her employment was being terminated on the grounds of redundancy. She received one months salary in lieu of notice.

[8] The shock from this undoubtedly suffered by Mrs Brake was exacerbated not only by her age and financial situation as a solo earner but also by the loss of the job so soon after leaving stable long term employment. She continues to suffer trauma, to the point of hindering her ability to take up new employment that has been offered to her.

[9] The primary issue for the Authority, as in any personal grievance, is justification for the employer's actions and the way the employer acted, in this case by dismissing an employee. In this regard the Authority has investigated claims that the redundancy was not genuine in the circumstances and that in addition, or alternatively, the redundancy decision was not implemented in a fair and sensitive way.

[10] Justification for any dismissal must be assessed by the Authority against the test provided at s 103A of the Employment Relations Act 2000, which is as follows;

the question of whether a dismissal ... 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.

Misrepresentation - Estoppel

[11] Associated with the justification issue is a claim that before entry into the employment relationship GTA had given Mrs Brake an undertaking that her employment would be of long duration. The claim is that because of representations made or assurances given to Mrs Brake immediately before offer and acceptance of the employment, it would be unjust for the firm later to escape from honouring its contractual promises by relying on redundancy as an otherwise lawful ground for dismissing an employee. In support of this claim Mr Reid addressed extensive submissions on law relating to misrepresentation and estoppel.

[12] The Authority accepts that in principle statements made before an employment relationship exists may be actionable under the Employment Relations Act. Remedies such as those for misrepresentation available under s 6 and s 7 of the Contractual Remedies Act 1979, and for misleading and deceptive conduct under s 12 of the Fair Trading Act 1986, are not dependant on the existence of an employment relationship to give the Authority jurisdiction, as this has been extended by s 162 of the Employment Relations Act to include any matter "related to an employment agreement." Such a matter may be negotiations leading to an employment agreement.

[13] It was contended for Mrs Brake that in pre-contractual discussions or negotiations with Mr Michael Grace, in response to her direct questions about the security of the position she was assured that it would be ongoing and of permanent duration. Mrs Brake raised a particular concern as to whether the return of a staff member then on maternity leave could lead to the loss of her position. Mr Grace assured her that it would not.

[14] Mr Michael Grace told the Authority that when Mrs Brake was interviewed in August 2009 he had portrayed the Senior Accountant position as being a permanent full-time position, which at the time he believed it was. However six months later Mr Lindsay Grace concluded that GTA had more positions than necessary for the work to be done and that its financial performance in the previous year under the existing structure had significantly deteriorated. Together with Mr Michael Grace he began to consider restructuring through reduction of staff numbers and by taking other cost saving or control measures.

[15] The Authority is satisfied from his evidence that in conjunction with the offer of employment Mr Michael Grace gave no guarantee or unqualified assurance that the position offered to Mrs Brake would remain in existence regardless of the commercial vicissitudes the accountancy practice might experience.

[16] I find that apart from the possible return of the staff member away on maternity leave no particular adverse circumstances that might arise in the future were specifically discussed. Mr Michael Grace naturally had wanted to be hopeful, positive and constructive about the future of the relationship and gave Mrs Brake a general expression of his wish for the position to be permanent and ongoing. That was, I am satisfied, genuinely his intention and therefore there was no misrepresentation by him in that regard.

[17] In principle an employer at the time of entry into the employment relationship could bind itself not to make a position redundant in the future regardless of changes in circumstances that might arise, but I am satisfied that Mr Michael Grace gave no specific undertaking of that kind which would be a rare if not unknown occurrence except perhaps in fixed term employment.

[18] I find that it was implicit between the parties to this employment relationship, as it is in most others that redundancy was not excluded from the agreement as a possible cause for termination of the employment by the employer. Also it was expressed to be such cause in the employment agreement Mrs Brake signed.

[19] By letter dated 10 August 2009, Mr Michael Grace sent to Mrs Brake written confirmation of an offer of employment and enclosed a copy of the firm's standard employment agreement. Execution of that agreement required Mrs Brake to give the usual declaration that she had read and understood its conditions and fully accepted them. She was required to declare that she had been advised of the right to seek independent advice and had been given reasonable time to do that.

[20] Clause 12 of the agreement under the heading "Redundancy" included the standard definition of redundancy, as follows:

Redundancy is a situation where the position of employment of an employee is or will become surplus to the requirements of the Employer's business.

[21] The clauses following this definition make it clear that redundancy could be a cause of "dismissal," for which notice of termination was to be provided.

[22] The employment agreement also included a relatively standard clause stating:

Each party acknowledges that this agreement contains the whole and entire agreement between the parties as to the subject matter of this agreement.

[23] I find it quite unlikely that Mr Michael Grace represented to Mrs Brake or assured her, that there would be no redundancy but then immediately afterwards sent her a draft of an employment agreement containing extensive redundancy provisions, hoping she would not notice that change or not understand what the provisions meant.

[24] Mrs Brake's evidence was that at the pre-employment interview the position was confirmed by Mr Michael Grace to be a long-term or permanent position. She said that although she was aware of the redundancy provisions in the employment agreement she gave them no thought.

[25] I find on this issue that Mr Grace gave no assurance or made no representation when entering into the employment relationship with Mrs Brake, that the redundancy provisions expressed in the employment agreement would not be invoked in the event of her position being considered, as a matter of commercial judgment, to have become surplus to the requirements of GTA's accountancy practice.

[26] With regard to the inducement element of misrepresentation, I find that a major attraction for Mrs Brake to enter into the agreement was not only the degree of permanency of the position - whether it would last 12 months, or two years, or more -but the significantly higher salary offered (a 25% increase) and also the change of employer culture or general working environment offered by a relatively small firm.

[27] Mr Michael Grace did not misrepresent his intentions for the future I find, as in August 2009 he did as a fact intend the position to be permanent. His representation that the possible return to work of the employee on maternity leave would not affect Mrs Brake's continued employment was not tested to be a misrepresentation, as the employee did not return. I find there was no misleading or deceptive conduct by GTA at formation of the employment agreement.

[28] For the above reasons I find that the pre-contractual conduct of GTA does not undermine the employer's claim that the dismissal of Mrs Brake was justifiable under s 103A.

Redundancy as the ground for dismissal

[29] There is no dispute about the legal principles to be applied in cases of redundancy. In *Simpsons Farms Ltd v Aberhart* [2006] NZEmpC 92; [2006] ERNZ 825, the Employment Court confirmed that the enactment in 2004 of the s 103A test of justification had not altered longstanding principles about substantive justification for redundancy. Those principles had been laid down by the Court of Appeal in well known cases such as *Hale* [1990] 2 NZILR 1079, *Aoraki Corporation Ltd v McGavin* [1998] 1ERNZ 601, and several others referred to in the Employment Court's judgment.

[30] Often quoted as part of the reasoning for those principles is the following passage from *Hale,* at page 1084;

an employer is entitled to make his business more efficient, as for example

by automation, abandonment of unprofitable activities, re-organisation 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 without him. .. the existence of remedies for unjustifiable dismissal should not be treated as derogating from the rights of employers to make management decisions genuinely on such grounds. Nor could it be right for the Labour Court to substitute its own opinion as to the wisdom or expediency of the employer's decision. When a dismissal is based on redundancy, it is the good faith of that basis and the fairness of the procedure followed that may fall to be examined on a complaint of unjustifiable dismissal.

[31] The Court of Appeal also said, at page 1086;

If for genuine commercial reasons the employer concludes that a worker is

surplus to its needs, it is not for the courts or the unions or the workers to substitute their business judgment for the employer's.

[32] Those views were reconfirmed by the Court in *Aoraki,* at page 618;

Redundancy is a special situation. The employees affected have done no wrong. It is simply that in the circumstances the employer faces their jobs have disappeared and they are considered surplus to the needs of the business. Where it is decided as a matter of commercial judgment that there are too many employees in the particular area or overall, it is for the employer as a matter of business judgment 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 and whether an employee whose job has disappeared should be offered another position elsewhere in the business.

[33] In finding that those principles continue to apply under s 103A of the Act, the Court in *Simpsons Farms* restated, at para[67] of its judgment;

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,

[34] I am satisfied that the assessment by GTA that Mrs Brake's position was surplus to requirements was based entirely on genuine commercial considerations and not on any personal factors such as her age or state of health. I am satisfied that Mr Lindsay Grace and Mr Michael Grace were quite unaware of the particular serious medical condition that Mrs Brake had been having treatment for over some years when they analysed the staffing levels and financial performance of GTA and decided, in good faith, that they needed to urgently consider measures to improve.

[35] Initially three positions were considered for redundancy but ultimately Mrs Brake was the only employee who was dismissed, as two others elected to resign in anticipation of dismissal for redundancy.

[36] In making an assessment some of the data Mr Lindsay Grace relied upon was incorrect and tended to make the financial position of the company look worse than it really was. That data indicated GTA would record a loss rather than a profit for the 09/10 financial year. The true picture was that the firm was $86,000 better off in its performance. There is no suggestion that incorrect data had been deliberately provided or used with the knowledge of Mr Grace, so as to justify decisions made to disestablish any position.

[37] This mistake was not discovered until May 2010, by which time Mrs Brake had been dismissed. The time of dismissal is the crucial time at which justification has to be assessed by the Authority under s 103A. Subsequently discovered information cannot therefore be among the circumstances relevant to that assessment. I am quite satisfied that at the time the decision was made to disestablish Mrs Brake's position, Mr Lindsay Grace had no reason to suspect a mistake had been made in the data he looked at. Also, as the Authority has learned, there were compelling personal reasons why he may not have been able to fully concentrate on making an accurate assessment of his firm's financial performance. Although containing an error, that data was accepted and relied on in good faith by Mr Lindsay Grace.

[38] In any event the restructuring decision was not made totally in reliance on incorrect data. Mr Lindsay Grace had assessed an over-capacity of staff numbers for the work in hand and future work expected to come in to the firm. No work was available to be allocated to Mrs Brake in her role as senior Accountant from April 2010 onwards. Significant cost overruns had occurred since the recession began because of the method GTA had been using to charge clients for its services. This was a fixed pricing system the firm had implemented about five years earlier but which proved to be unsound and had led to time being increasingly written off instead of billed and paid for. A significant reduction in the firm's cash flow was also measured by Mr Lindsay Grace in April 2010 and was a factor prompting GTA to consider restructuring.

[39] I am satisfied that the decision to make Mrs Brake's position redundant was a decision made in good faith by GTA solely in the interests of saving costs and achieving greater efficiency. The dismissal of Mrs Brake as a consequence was therefore substantively justifiable under the test of s 103A of the Act. I find that how GTA acted was, at the time, what a fair and reasonable employer would have done in all the circumstances.

Consultation - procedure generally

[40] The Authority is satisfied that in accordance with the express provisions of the employment agreement, Mrs Brake was fully and properly consulted regarding the possibility of redundancy. Both s 4(1A) of the Act and an express term of the employment agreement required the provision of information or access to information, which I am satisfied was given. I find that in the course of consultation the employer gave Mrs Brake sufficient information to enable her to understand the workflow and financial indicators under consideration by GTA and the proposals put forward by the Graces to address the situation.

[41] Mrs Brake was I find told that Last On - First Off was to be used as the method of selecting staff for redundancy. It is a common and legitimate method, and the decision whether to use it or some other basis of selection was for the employer.

[42] Mrs Brake was given the firm's figures for the previous five years for GST, turnover and payroll. Of her own initiative she also accessed information GTA had supplied to the IRD. Increased running costs were discussed with her I find, and she was advised of her entitlements under the employment agreement in the event of redundancy.

[43] A major concern of Mrs Brake's during consultation was to find out how the work of her position would be performed if she was made redundant. She said she had wanted to know how staff would cope with any of that work. The company advised her that the work would redistributed between Mr Michael Grace and another staff member. That has occurred and no new staff have been employed to do work Mrs Brake had been doing.

[44] Mrs Brake also had computer access to the forward plan for her work and that of other employees and could see for herself the reduction in available work. I do not consider the employer was required to provide a forward plan that detailed how particular jobs would be reallocated to and performed by particular staff over a period of time.

[45] I find that the access to information requirements of s 4(1A) of the Act and the express terms of the employment agreement were met in this case.

[46] I accept from the evidence for GTA that alternatives to redundancy were considered and discussed with Mrs Brake. They included reducing her hours to that of a part-time employee and making existing part-time staff redundant. In accordance with legal principle, the employer's decisions about those alternatives were for it to make not the Authority. I am satisfied that they were rejected for genuine operational reasons and not because Mrs Brake had been targeted for dismissal.

[47] Applying the test of justification at s 103A of the Employment Relations Act the Authority determines, on an objective basis, that 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 of Mrs Brake occurred.

Determination

[48] For the above reasons the determination of the Authority is that Mrs Brake does not have a personal grievance for unjustified dismissal or any other reason.

Costs

[49] Costs are reserved.

[50] The parties are urged as usual to try and settle any issue of costs themselves. If they are unable to agree, in view of the result GTA may apply to the Authority for an order within 21 days of the date of this determination. Mrs Brake may reply in writing within 21 days of service of any costs application.

Non-publication

[51] Pursuant to clause 10 of Schedule 2 of the Act, the Authority orders that all evidence of the GST returns of Grace Team Accounting Ltd and other financial information about the firm disclosed to the Authority and Mrs Brake on 12 July 2010, is not to be published in any form by any person to any person outside the parties and their representatives involved in this investigation.

[52] An order is also made on the same terms prohibiting from publication the medical records of Mrs Brake, as disclosed by her on 12 July 2010 for the purposes of this investigation.

A Dumbleton
Member of the Employment Relations Authority
