

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 160
5407705

BETWEEN BRIAR BRIGHT
 Applicant

AND GLOBAL CANDY LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: S Austin, advocate for applicant
 S McBeath, advocate for respondent

Investigation meeting: 24 January 2014

Submissions received: 28 January 2014 from applicant

Determination: 28 April 2014

DETERMINATION OF THE AUTHORITY

- A. Global Candy Limited dismissed Briar Bright unjustifiably on the ground of redundancy.**
- B. Global Candy Limited is ordered to pay to Ms Bright the sum of \$2,500 as compensation for the injury to her feelings caused by the unjustified dismissal**

[1] Global Candy Limited (GCL) supplies supermarkets, dairies and restaurants with confectionery in bulk. It employed Briar Bright as a part time sales representative servicing the Gisborne region, commencing in January 2012.

[2] Cadbury Confectionery Limited (Cadbury) was a major supplier of GCL, with its products comprising 30% of GCL's annual turnover. In August 2012 GCL was in dispute with Cadbury over unpaid accounts in a substantial amount. This led Cadbury to place a stop credit on GCL's account, so that GCL could not take possession of product to on-sell unless it paid for the product at the same time. It was unable to do this, and its ability to rely on generating sales to repay the debt it already owed was

severely compromised. At the same time it was unable to increase its credit with other suppliers, and the debt it owed to Cadbury was not its only debt. Its sales and turnover decreased and its financial position deteriorated sharply.

[3] Between August and November 2012 GCL's directors, Paul and Lorraine Hewitt, took a number of steps to improve the company's sales performance and financial position. However by November 2012 it faced liquidation in that: cash flow had reduced and there was no indication this would change; debt levels remained high; the directors had no more personal funds available to invest; loan facilities were at their maximum; and there were difficulties in obtaining credit from other suppliers. The directors turned to the possibility of downsizing the company and of redundancies. One warehouse position was made redundant in November.

[4] An analysis of sales activity indicated there was a higher proportion of unprofitable sales in the Gisborne region than in the Waikato and Bay of Plenty regions, and at the office base. A costs analysis revealed that the Gisborne region's transport and travel costs in particular contributed to higher overall costs as a proportion of sales than was the case in the Waikato and Bay of Plenty. Total sales in Gisborne were also lower than in the other regions.

[5] This was mainly because of the nature of the region – that is, the sales area comprised only one large centre in the form of Gisborne city, the area was spread thinly in that it extended beyond Gisborne city to small towns and settlements to the north and south, significant travel was required, and many of the customers were small and placed only small and unprofitable orders.

[6] The directors concluded that the Gisborne operation was not sustainable. Ms Bright was the sole representative servicing the region.

[7] On GCL's account, on 23 November 2013 Mrs Hewitt telephoned Ms Bright to advise that consideration was being given to making her position redundant. Ms Bright merely replied that 'shit happens'. When the reasons for the proposed redundancy were explained she commented 'you would be a mug if you didn't see this coming'. Mr and Mrs Hewitt expected further comment from Ms Bright on the proposed redundancy. When they did not receive it, by emailed message dated 25 November they again explained that they had no choice but to downsize and attached a letter for distribution to customers.

[8] Ms Bright's account of the 23 November conversation was that Mrs Hewitt told her she was being given two weeks' notice of the termination of her employment. Mrs Hewitt went on to explain the reason was the need to cut costs. Ms Bright did say 'shit happens', but her response was not an acknowledgement that the termination was expected – rather it was an expression of shock. She denied making the comment attributed to her when the reason was explained. She said she was not aware any further feedback or response was being sought from her, so she did not provide any.

[9] Ms Bright's employment terminated at the end of the notice period, on the ground of redundancy. She says this was an unjustified dismissal, and has raised a personal grievance.

[10] The issues are:

- a. was dismissal the action a fair and reasonable employer could take in the circumstances at the time, with particular reference to whether, -
 - (i) the conclusion that the business could be made more efficient by the disestablishment of Ms Bright's position was one a fair and reasonable employer could reach,¹ and
 - (ii) GCL met its obligation to consult with Ms Bright², and
- b. if not, what is the remedy

Was dismissal the action a fair and reasonable employer could take

1. The conclusion regarding efficiency

[11] Save for the impact of the alleged failure to consult, there was little challenge to the business reasons for making Ms Bright's position redundant. From the above account of GCL's circumstances I find the conclusion that the business could be made more efficient by the disestablishment of Ms Bright's position was one a fair and reasonable employer could reach.

2. Was the obligation to consult met

[12] GCL says it met its obligation to consult by:

¹ s 103A Employment Relations Act 2000; *Rittson-Thomas t/as Totara Hills Farm v Davidson* [2013] NZEmpC 39

² s 4 and 103A of the Act, *Rittson-Thomas*.

- keeping Ms Bright and the other sales representatives informed of the company's financial situation through emailed messages and discussions, from August 2012 onwards;
- advising Ms Bright of the possibility of redundancy in the 23 November phone call;
- inviting a response from Ms Bright before the final decision was made; and
- finalising its decision on 25 November, when no response was received.

[13] The sales representatives were aware of the dispute with Cadbury, and of the difficulties with supplies. They were aware that, from time to time, stock was not available for sale. They also received regular emailed messages consistent with GCL's attempts to improve the company's performance, including in particular exhortations to press its own customers for payment of monies owed to it. Some of these messages also commented in a general way to GCL's ability to pay its own bills when it was not itself being paid.

[14] It was common ground that Mr Hewitt and Ms Bright had a conversation about how Ms Bright's Gisborne run could be better serviced and how its costs could be cut. No suitable proposal was identified. Mr Hewitt believed there was no way Ms Bright would 'not get the message' about the future of her employment. For her part Mrs Hewitt said she told Ms Bright it would be necessary to cut costs in Gisborne in order for the region to be viable.

[15] However these communications did not go further and make it clear that Ms Bright's ongoing employment could be in jeopardy, or why. Many were just as consistent with a general push to improve performance. Ms Bright was not, for example, made aware of GCL's sales activity and costs analyses, what use was being made of these, or of the extent of the threat to the company's financial position. Nor was she given information about why circumstances had so deteriorated by late November that the decision to disestablish her position was made.

[16] Secondly, I am not satisfied the discussion on 23 November identified sufficiently clearly that the disestablishment of Ms Bright's position was a proposal, and that feedback from Ms Bright was sought before the proposal was implemented. At the time Ms Bright was not, in any event, in possession of sufficient information

on which to base any proposal. Further, the 25 November message did not refer to any failure by Ms Bright to respond to the proposal, or to a resulting decision to proceed. It simply contained a further explanation of why the decision had been made, and expressed regret.

[17] For these reasons I find GCL relied too much on an expectation that Ms Bright would draw inferences about her future, and do not accept that it did enough to meet its obligations to consult with her.

3. Conclusion

[18] GCL pointed out that it was a small company with only 6 employees. It did not have access to human resources services, and did not have the funds to engage specialist assistance. Instead it relied on its ability to communicate through maintaining close relationships with its staff.

[19] These considerations are relevant in assessing the justification for GCL's action.³ On balance, however, they are not sufficient to displace the undue reliance placed on Ms Bright's ability to draw inferences from the parties' exchanges.

[20] For these reasons I conclude that Ms Bright's dismissal was unjustified.

Remedy

[21] Ms Bright seeks:

- (i) reimbursement of remuneration lost as a result of her personal grievance; and
- (ii) compensation for the injury to her feelings caused by the grievance.

1. Reimbursement of lost remuneration

[22] Ms Bright was paid \$700 per week. She seeks reimbursement of the remuneration lost as a result of her personal grievance, calculated as:

$$13 \text{ weeks} \times \$700 = \$9,100$$

³ S 103A(3)(a) and 103A(5)

[23] I am satisfied the redundancy was genuine and that a reasonable alternative arrangement was not available. Even if the obligation to consult had been met, no position would have remained for Ms Bright and the termination of her employment would have been justified. In other words, she would have lost remuneration regardless, and the loss is not attributable to the personal grievance.

[24] There will be no order for the reimbursement of lost remuneration.

2. Compensation for injury to feelings

[25] Ms Bright is entitled to compensation for the injury to her feelings arising from GCL's failure to meet its obligation to consult, but not otherwise for the loss of her job.

[26] I accept that the failure caused injury to Ms Bright's feelings. GCL is ordered to compensate her for that injury in the sum of \$2,500.

Costs

[27] Costs are reserved.

[28] The parties are invited to resolve the matter. If either party seeks an order from the Authority the party shall have 28 days from the date of this determination in which to file and serve a written account of what is sought and why. The other party shall have a further 14 days from the date of receipt of that account in which to file and serve a written reply.

R A Monaghan

Member of the Employment Relations Authority