IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 424/10
5159479

	BETWEEN	TRUDY BUTTERWORTH Applicant
	AND	TBA COMMUNICATIONS LIMITED Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Mark Ryan, counsel for Applicant Gretchen Stone, counsel for Respondent
Investigation Meeting:	29 June 2010
Submissions Received	6 and 20 August 2010
Determination:	29 September 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Ms Trudy Butterworth was employed by the respondent TBA Communications Ltd from May 2003 until April 2009. She began as a MacOperator and in 2007 became Studio Manager with responsibility for supervising several MacOperators and for doing some of that work herself.

[2] Ms Butterworth's positions from 2003 were acknowledged and expressed to be part time. At the beginning of 2009, when she was working at least 25 hours a week including some voluntary overtime, there were discussions about the need TBA saw to have a Studio Manager working full time. Those discussions, between Ms Butterworth and TBA's General Manager, Mr William Carruthers, continued over several weeks until about 4 March when TBA purported to disestablish her part time Studio Manager position.

[3] Ms Butterworth was given one months notice and advised that a vacancy for a full time Studio Manager would be advertised. She was sent a copy of the advertisement by Mr Carruthers who encouraged her to apply for the position.

[4] While working out the notice period Ms Butterworth through her legal adviser Mr Ryan raised a personal grievance with TBA. In a response written by TBA's legal adviser Ms Stone, feedback was requested from Ms Butterworth as to whether she was going to apply for the full time role. In another letter Ms Stone advised Mr Ryan that if Ms Butterworth did apply she would be "considered very favourably" for appointment. By letters of 20 and 31 March, Ms Stone further enquired whether Ms Butterworth was going to apply for the full time position.

[5] Mr Ryan replied on 1 April 2009, advising that the advertised position was the same as the one Ms Butterworth already held and that she therefore saw no useful purpose in applying for it. Mr Ryan advised, "She confirms her earlier advice to your client that she was flexible in the hours that she could work in her role as Studio Manager/MacOperator. In addition your client was fully aware of my client's childcare commitments."

[6] The Authority began its investigation of Ms Butterworth's employment relationship problem when she applied with urgency for interim reinstatement, about a fortnight after her employment had ended.

[7] In the statement of problem lodged with the application Ms Butterworth alleged that TBA had unjustifiably terminated her employment on the grounds of redundancy. She alleged that the redundancy was not genuine and that TBA had not followed a fair process in dismissing her.

[8] Following an investigation meeting the Authority issued its determination of the interim reinstatement application on 23 June 2009 (under AA201/09). In declining it the Authority held at para.[33] of its determination;

> *The evidence, although in affidavit form, raises no suggestion that this was not a genuine redundancy situation in the sense that the decision to disestablish or change Ms Butterworth's position was driven by commercial considerations rather than anything to do with Ms Butterworth personally or her performance. Mr Carruther's untested evidence points to a genuine redundancy situation existing.*
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> *It seems more likely that if Ms Butterworth were to succeed with her grievance claim it would be because of the alleged failure on the part*

> *of TBA to consult with her before implementing the restructuring. Also, it is possible that a finding could be made on the evidence, once it has been given and tested, that Ms Butterworth did signify her acceptance of a position offered to her in the full time role discussed by Mr Carruthers. Success with her grievance on this basis would not necessarily lead to reinstatement as being a practicable remedy in the circumstances where an appointment has been made to the position advertised, and more likely the remedies would be monetary only, to address lost wages and hurt feelings, humiliation and distress.*

[9] Generally in interim reinstatement cases where redundancy is claimed to have been the grounds for dismissal, if a serious question has not been raised that the redundancy was other than genuine, applicants are unlikely to be able to establish, as they must, an arguable case that they will be reinstated if successful with their personal grievance.

[10] At the end of its June 2009 determination the Authority contemplated a full investigation would take place in July. Subsequently, in mid July 2009, Mr Ryan advised that Ms Butterworth was no longer seeking reinstatement. Over the next few months the parties returned to mediation but could not resolve the grievance claims. The investigation meeting of the substantive grievance claim did not take place until June 2010.

[11] In final written submissions Mr Ryan identified and addressed several issues which I agree are central to the investigation of this case and its determination. Directly or indirectly those issues and Ms Stone's submissions for TBA are dealt with below.

[12] Ms Butterworth's personal grievance is a claim of unjustifiable dismissal by TBA and a claim of unjustifiable action to her disadvantage.

[13] The grievance is therefore to be determined by applying the legal test of justification given at s 103A of the Employment Relations Act 2000. In accordance with that provision the Authority must consider, on an objective basis, whether TBA's actions and how TBA acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[14] For the claim of unjustifiable dismissal the relevant time is 4 April 2009. On that date Butterworth's employment contract came to an end, upon the expiry of the notice she had been given. For the claim of unjustifiable action the relevant time is a

month earlier, on or about 4 March 2009, when TBA advised Ms Butterworth that her part time position as Studio Manager was being disestablished. TBA claims that despite the discussions about redeployment that took place with Ms Butterworth, by 4 March she had not consented to any variation to her position that would have enabled the employment relationship to change from part time to full time.

[15] Other times that are material to the claim of disadvantage grievance are when, as alleged by Ms Butterworth, there was a failure by TBA to consult her about change in the employer's business by the establishment of a full time Studio Manager position and the dis-establishment of the part time position she had been performing.

Need for change

[16] I find from Mr Carruther's evidence that in early January 2009 he found it necessary to assess the amount of time each day and each week that TBA required a Studio Manager to work. His assessment was made in response to advice given by TBA's standing client, Bunnings Warehouse, of its intention to open six new stores during 2009. Measured in terms of cost and job creation as but two indicators of scale, this was a major expansion by Bunnings. TBA was to be involved in the advertising campaign leading up to the opening of each new store and in the regular ongoing advertising work needed after that.

[17] Mr Carruthers estimated that for his advertising agency to provide the services required by Bunnings over the period of introduction of the new stores and beyond, TBA's MacOperators would need to be able to handle a 20% increase in the work supervised by the Studio Manager. Mr Carruthers concluded from his estimate that to meet the needs of the business it was necessary for TBA to have a full time Studio Manager who was available to supervise the MacOperators' work for 40 hours a weeks instead of 25.

Was the dismissal substantively justified?

[18] There is no dispute about the legal principles applicable to cases of redundancy. In 2005 the principles well settled from earlier Court of Appeal cases were confirmed as continuing to apply after the introduction of s 103A of the Act, by the Employment Court in *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825. That case reaffirmed the entitlement of an employer to make its business more efficient by

reorganisation and also that an employee does not have a right to continued employment if greater efficiency is a goal of the employer.

[19] As an exercise of business judgement TBA assessed that having one full time position of Office Manager was more efficient than having two part time positions, or having one part time and one full time position. Having concluded that TBA's assessment was genuinely made, it is not for the Authority to opine as to the wisdom of that reorganisation.

[20] The Authority is quite satisfied that TBA's decision to make changes was driven by commercial imperatives which, as is well established by the cases, are a matter for the employer to assess and respond to. TBA's decision was based on the assessment of the advertising agency's performance with a part time Studio Manager position in comparison with what could be achieved by having the position full time. The decision was not based, I am satisfied, on anything such as Ms Butterworth's conduct or performance that was personal to her as the holder of the position at the time.

[21] On that basis, applying s 103A of the Act, the Authority concludes that in all the circumstances at the termination of Ms Butterworth's employment on 4 April 2009 there were sufficient grounds to justify the way TBA acted in dismissing Ms Butterworth, as being what a fair and reasonable employer would have done.

Consultation - Requirement for employer to provide information

[22] I find that Mr Carruthers told Ms Butterworth in January 2009 about Bunnings major expansion programme for the year ahead and its likely impact on TBA. I find that Mr Carruthers sought Ms Butterworth's views or feedback about his proposal to reorganise the staffing of the agency to include a full time Studio Manager. I am satisfied that Ms Butterworth was given a reasonable opportunity to consider the situation and to respond during further discussions that took place.

[23] There is no dispute that the degree of change that had been proposed by Mr Carruthers between the part time and full time Studio Manager's positions, was great enough to require Ms Butterworth's consent to be obtained before she could be expected to work full time. Ms Stone confirmed in her submissions that TBA did not contend that unilaterally the employer could have required her to increase her hours from part time to full time.

[24] I find that in early 2009 when Mr Carruthers began discussions with Ms Butterworth he plainly sought her consent to become redeployed by changing her part time hours of work as Studio Manager to full time. Initially Ms Butterworth questioned the need for any change at all, as she considered the existing staffing arrangements would be sufficient for the MacOperators and herself to handle any increase in work load. later her approach was to seek a degree of flexibility in any increased hours she agreed to, enabling her to continue with care arrangements she had for her children after school. She agreed to extend her regular finish time to 4 pm but not beyond.

[25] Mr Butterworth claims that during the discussions with Mr Carruthers she eventually moved to a point where she accepted the proposal to work on a full time basis. Mr Carruthers claims there was no consent given by Ms Butterworth and he therefore had to proceed with advertising the position. There is no dispute that he encouraged Ms Butterworth to apply for it by indicating that she had a strong chance of being successful.

[26] I find from the evidence that Mr Carruthers reasonably believed Ms Butterworth had not given an unqualified acceptance to work full time hours, because it remained her express wish to retain "flexibility." Her representative Mr Ryan had written on 10 March advising that Ms Butterworth was willing "to extend her hours to that of a full time position but she would need some flexibility." On 1 April the advice from Mr Ryan was that Ms Butterworth "was flexible in the hours that she could work in her role."

[27] A situation was created where there was uncertainty or room for misunderstanding between Ms Butterworth and Mr Carruthers as to whether there was any clear and unequivocal acceptance by her of the full time position offered. In those circumstances Ms Butterworth was I find unjustifiably disadvantaged by TBA's action of not granting her request for a copy of the agreement intended to vary the part time position she held.

[28] Mr Carruthers in his written evidence agreed that Ms Butterworth on 4 March had said to him something like, "I would like to see a new employment agreement and I might be able to work more hours with some flexibility." He said that at that stage he did not have a proposed employment agreement for the position to be advertised, as he believed he had made it clear he had already made arrangements for, but that the

Studio Manager position was to be full time. He thought Ms Butterworth knew "the ins and outs" of the role.

Section 62A of the Employment Relations Act

[29] Section 62A(2) of the Act requires an employer to do several things when bargaining for terms and conditions under an individual employment agreement. The employer must provide the employee with a copy of the intended agreement, or part of the intended agreement, under discussion and must advise the employee that he or she is entitled to seek independent advice about the intended agreement. The employer must also give the employee a reasonable opportunity to seek that advice and must consider and respond to any issues that the employee raises.

[30] Those requirements are expressed by s 63A(1)(e) to apply when;

> *In relation to terms and conditions of an individual employment agreement for an employee…… no collective agreement covers the work done, or to be done, by the employee.*

[31] The reference to "the work done … by the employee" indicates that the provision applies to bargaining for a variation of an existing individual employment agreement, as well as to bargaining for an agreement to cover work "to be done" in future employment.

[32] Under s 65(2)(a) of the Act the individual employment agreement of an employee must be in writing and must contain terms that include;

> *(iv) An indication of the arrangements relating to the times the employee is to work;*

[33] Accordingly, under s 63A(2) of the Act a proposed variation must be in writing, and under s 65 a variation once executed or concluded must also be in writing.

[34] The bargaining that took place between Mr Carruthers and Ms Butterworth, culminating on about 4 March with TBA giving notice of the dis-establishment of Ms Butterworth's part time position, was carried on in breach of s 63A(2) and therefore the way the employer acted in that regard was not justifiable.

[35] Every employer who fails to comply with s 63A is liable to a penalty imposed by the Authority, in this case to a maximum of $10,000 (soon to be doubled by

amendment to the Act). No application for a penalty has been made and the 12 month period within which a penalty must be sought expired six months ago.

[36] To have a personal grievance there must be not only a lack of justification in the actions of an employer but a disadvantage caused or created by the unjustified action. I find that the failure to commit the intended variation of Ms Butterworth's individual employment agreement to writing and provide her with a copy, led to a situation of uncertainty between the parties as to what had or had not been agreed to by 4 March when TBA decided to advertise the full time position.

[37] A copy of the intended agreement ought to have put it beyond doubt that Ms Butterworth was being asked to give her consent to a variation. She would have had the opportunity to seek independent advice and, if she had wished, to return and continue bargaining over any issues she wanted to raise. The "flexibility" she sought could have been identified and TBA could have consented to that or not, as it wished.

[38] If Ms Butterworth had been given the opportunity to inspect a copy of the intended agreement and take advice about it, and if she had decided to decline acceptance, there is unlikely to have been any basis on which to challenge the subsequent action of the employer, if it genuinely dis-established her position on the grounds of redundancy, advertised a new position and allowed Ms Butterworth to decide whether she wished to apply for it or not.

[39] As it turned out she did not apply for the advertised position because she claimed it was the same position she already held, or was a position that had been varied with her consent. She lost an opportunity to have that confirmed by applying for the position and being reappointed.

[40] By contrast with its actions towards Ms Butterworth, TBA gave a person who applied and was interviewed for the full time position a copy of the intended agreement, before it was signed. The appointee was also offered an opportunity to seek legal advice about it. He considered he obtained flexibility in his arrangements, by having start and finish times agreed to be 8.30am to 5pm rather than 9am to 5.30pm. The appointee also negotiated a salary that was higher than the advertised indication.

[41] I find that the situation which developed cost Ms Butterworth an opportunity to try and negotiate precisely the undefined "flexibility" that she had sought for

herself, as well as negotiate over the salary for the full time position. There is no claim for any remedy based on loss of opportunity arising from a failure to provide a statutory entitlement.

[42] I do not regard this failure in relation to a proposed variation to the employment agreement constituted a dismissal of Ms Butterworth. Her grievance is therefore not one of unjustified dismissal. It is however a failure amounting to an unjustified disadvantage and I find she is entitled to such remedies as are appropriate to the circumstances.

Remedies

[43] To remedy her personal grievance Ms Butterworth seeks an order requiring TBA to reimburse wages lost by her as a result of the grievance. She also seeks the payment of compensation by TBA for humiliation, loss of dignity and injury to feelings. The Authority has determined that Ms Butterworth has a grievance of unjustified disadvantage but not unjustified dismissal.

[44] I find that Ms Butterworth did not contribute in any way to the situation that gave rise to her grievance. Withholding consent to redeployment through variation of her employment agreement was not a matter of fault or blame, and neither was her election not to apply for the advertised position, appointment to which would have preserved her employment.

[45] No reduction in any remedies assessed by the Authority is required on account of contributory fault.

[46] There is clear statute and case law that must be applied in assessing remedies such as lost wages and compensation. Under s 123 of the Act reimbursement and compensation may be ordered only for loss and harm resulting from the grievance, not from other causes. The case law is from the Court of Appeal judgments given in *Telecom NZ Ltd v Nutter* [2004] 1 ERNZ 315 and in *Waitakere City Council v Ioane* [2004] 2 ERNZ 194; the Authority when fixing compensation is to have regard to the actual provable loss and harm suffered by the employee, and the assessment must allow for all contingencies.

[47] Ms Butterworth received no wages while out of work from April to July 2009. She also suffered stress requiring medical assistance. The question for the Authority

is to what extent the loss and harm were caused by the justified redundancy dismissal and reaction to the pending loss of employment?

[48] The actual disadvantage to Ms Butterworth by not having the proposed variation to her employment agreement put in writing was limited. Even without seeing it in writing Ms Butterworth was quite familiar, as Mr Carruthers put it, with the "in and outs" of the Studio Manager role and there had been discussion about the hours of work required in changing from part time to full time.

[49] I have found that in the way TBA acted it breached provisions of the Employment Relations Act. The appropriate remedy for that will usually be a penalty, part or even all of which may be awarded to the employee in suitable cases. No penalty has been claimed in this case.

[50] A contingency that must be allowed for is that if Ms Butterworth had been given a copy of the proposal variation to vary her employment agreement she may still have chosen not to accept and may still have decided not to apply for the advertised full time position. This was likely in my view and not just a possibility.

[51] I find that Ms Butterworth's loss of wages after 4 April when her employment terminated was caused by genuine redundancy leading to the removal of her part time position, and also by her decision not to apply for the advertised full time position. The decision was based on her mistaken view that the two positions were the same. That mistake was not a reasonable one, as it should have been quite apparent from the oral discussions and her urge to resist the proposed change, that the positions were only the same in of duties and responsibilities. In respect of an important term, hours of work, they were distinctly different positions. No order is therefore made for reimbursement of lost wages.

[52] As most employees would be, Ms Butterworth was understandably upset and distressed by the prospect of serious change being made to her position of employment. Ultimately the change was achieved lawfully by declaring the position surplus to requirements. The harm to Ms Butterworth caused by that consequence is therefore not compensateable.

[53] For the distress caused to Ms Butterworth by not having the proposal to vary her employment agreement put in writing as she had requested, compensation of $1,000 is ordered to be paid to her by TBA, pursuant to s 123(1)(c)(i) of the Act.

Costs

[54] Costs are reserved. Given the outcome of the interim reinstatement application and now this determination of the substantive claim, there may be a basis for the parties to settle the question of costs themselves. If not, directions may be sought from the Authority for the filing of an application and response to it.

A Dumbleton
Member of the Employment Relations Authority