

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Reka (Chen) Chen  
**AND** Polar Food Distributors Limited  
**REPRESENTATIVES** Reka Chen in person  
Brian Rakich for Respondent  
**MEMBER OF AUTHORITY** Vicki Campbell  
**INVESTIGATION MEETING** 26 February 2007  
**DATE OF DETERMINATION** 5 March 2007

**DETERMINATION OF THE AUTHORITY**

**Employment Relationship Problem**

[1] Polar Food Distributors Limited ("PFDL") distribute fresh, frozen, tinned and dry foods and goods in the greater Auckland area to customers including hotels, restaurants, resthomes and caterers. Ms Reka Chen was employed by PFDL as a sales person at the rate of \$15.00 per hour and worked 40 hours per week Monday to Friday inclusive. Her duties included ringing customers to take orders, invoicing, personal visits to customers, and administrative tasks such as providing reports and undertaking data entry. There was no written employment agreement.

[2] Ms Chen was made redundant on 30 March 2006. Ms Chen claims the redundancy amounted to an unjustified dismissal. PFDL denies the claim and says Ms Chen was genuinely redundant and the dismissal was justified.

[3] I am required to scrutinise PFDL's actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

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 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.

[4] The test of justification does not change the longstanding principles about justification for redundancy (see *Simpson Farms v Aberhart*, unreported, Employment Court, Colgan CJ, AC52/06, 14 September 2006).

**Background**

[5] Ms Chen says she knew the company was having financial difficulties because she was aware the company had had to reduce stock levels and purchases. On 13 March 2006 the three shareholder directors of PFDL met and decided Ms Chen would be made redundant at the end of the financial year on 31 March 2006.

[6] On Monday 27 March 2006 at the usual weekly Monday morning meeting, Mr Rakich, managing director, advised those present (including Ms Chen) that the company would have to make cut backs. There was no discussion at that meeting that employees may be made redundant.

[7] On 30 March 2006 Ms Connie Chen (no relation to the applicant) and the only other sales person employed by PFDL, attended a meeting with Mr Rakich where he raised with her his disappointment in the performance of the sales department. He told Connie that he was thinking of reorganising the company to achieve more sales. He asked Connie whether her job was her chosen career. Connie told Mr Rakich that she had just completed her real estate agent exams and was intending leave her position and pursue a career in real estate. Mr Rakich told Connie she was a valuable employee and she should talk this over with her partner and then advise him whether she wished to stay with the company or not. Connie resigned the following day, providing two weeks notice.

[8] Following her meeting with Mr Rakich (and on 30 March 2006), Connie repeated to Ms Chen the discussions she had had with Mr Rakich including her advice to Mr Rakich that she was intending to leave her job.

[9] That same day, 30 March 2006, following her discussion with Connie, Ms Chen was invited to also meet with Mr Rakich. Mr Rakich advised Ms Chen that she was being made redundant and could chose to leave immediately and be paid out in lieu of notice or work out the two weeks notice. Ms Chen chose to leave that day and receive payment in lieu of notice. Ms Chen's dismissal was confirmed in writing to her which she received the following day by post.

[10] Within a couple of days of her dismissal Ms Chen received a call from a customer of PFDL who advised her that a new lady had commenced work at PFDL and was ringing them each day for their order. Ms Chen felt she had been unfairly treated and wrote to Mr Rakich setting out her view that the termination of her employment was unfair given the immediate employment of a new employee who was ostensibly doing the very job that she had been made redundant from.

[11] Ms Chen went into work on Wednesday 5 April 2006 to give Mr Rakich a copy of the letter and to discuss the situation with him. Both Mr Rakich and Ms Chen became angry during

the discussion with the result that Mr Rakich told Ms Chen to leave the premises and not return.

**Was the redundancy genuine and carried out in a fair and reasonable manner?**

[12] Genuineness is considered in relation to whether or not the redundancy was the actual reason for dismissal rather than being a sham (see *Staykov v Cap Gemini Ernst & Young NZ Ltd*, unreported, Travis J, AC 18/05, 20 April 2005). An employer must act genuinely and not out of ulterior motives. Business decisions about the number of positions required in an organisation are for the employer to make and not the Authority (see *Simpson Farms v Aberhart*).

[13] It was common ground at the investigation meeting that PFDL as a business was not showing solid profits on its accounts and in the words of Ms Chen "...had financial problems". Mr Rakich says he had to reduce the number of sales people employed to try and make the business more effective.

[14] Section 4 of the Employment Relations Act 2000 requires PFDL to deal with Ms Chen, in good faith. This duty is to be exercised not only generally but in specific situations, including redundancy.

[15] The duty of good faith set out in the Act requires an employer, proposing to make a decision that will have an adverse affect on the continuation of employment of an employee, to provide to that employee, access to information relevant to the continuation of the employee's employment, and an opportunity to comment on the information before the decision is made. The requirement to consult is therefore, a statutory obligation.

[16] In *Communication & Energy Workers Union Inc v Telecom NZ Ltd* [1993] 2 ERNZ 429, the Court discussed the meaning of "consultation" in the context of redundancy, and listed a series of propositions extracted from the Court of Appeal's decision in *Wellington International Airport Ltd v Air NZ* [1993] 1 NZLR 671 (CA). In particular, the Court noted:

- (a) Consultation requires more than mere prior notification and must be allowed sufficient time. It is to be a reality, not a charade. Consultation is never to be treated perfunctorily or as a mere formality.
- (b) If consultation must precede change, a proposal must not be acted on until after consultation. Employees must know what is proposed before they can be expected to give their view.
- (c) Sufficiently precise information must be given to enable the employees to state a view, together with a reasonable opportunity to do so. This may include an opportunity to state views in writing or orally.
- (d) Genuine efforts must be made to accommodate the views of the employees. It follows from consultation that there should be a tendency to at least seek consensus. Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done.
- (e) The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.

[17] There was no consultation with Ms Chen prior to the decision being made to terminate her employment at the end of March. It was common ground that the decision to make Ms Chen redundant had been made by the Shareholder Directors at a meeting on 13 March 2006.

[18] When Mr Rakich met with the staff on 27 March 2006 and advised those present that the company would be making cutbacks, there was no indication that at least one member of staff would or even could be faced with redundancy.

[19] Mr Rakich then met with each of the two sales people individually on 30 March as set out above. It staggers me that having had a discussion with Connie, during which she made it clear she was intending to leave, Mr Rakich continued to advise Ms Chen of the decision to dismiss her for redundancy. He did this in the knowledge that if Connie then resigned from her employment he would be left with no experienced sales staff.

[20] As events transpired that's exactly what did happen. A new staff member was employed and commenced work on the following Monday morning. Mr Rakich told me the new employee was working on a part-time basis and therefore the jobs were different. I do not accept that. I am satisfied that the work undertaken by the new employee was the same work previously undertaken by Ms Chen. Further, I am satisfied that at the time the new employee was employed she was employed on the basis of working 40 hours per week and at the same rate of pay as Ms Chen. This arrangement continued for at least the first two months of her employment.

[21] In answer to questions at the investigation meeting regarding the selection process used, Mr Rakich told me he chose Ms Chen for dismissal instead of Connie, because Ms Chen had asked for a pay increase three times and he had had to speak with her on at least two occasions because of complaints from customers about her poor English skills.

[22] Having interviewed Ms Chen I am surprised that English skills were an issue. Even though an interpreter was available for assistance at the investigation meeting, her services were seldom used.

[23] In relation to Ms Chen asking for a pay rise, I find Mr Rakich offered to review Ms Chen's pay after the first three months of her employment. After six months employment Ms Chen reminded Mr Rakich of his promise to review her wages. At that time Mr Rakich advised Ms Chen he would let her know two weeks later, which again, Ms Chen followed up. Mr Rakich conceded at the investigation meeting that what Ms Chen did was to follow-up on promises he had made rather than initiating repeated requests for a pay increase.

[24] I find, in all the circumstances, the decision to make Ms Chen redundant was profoundly unfair. Ms Chen was never given formal notice that redundancy was a possibility and there was no consultation over the possibility of the redundancy, in a situation where consultation is expected. The lack of consultation and the manner in which the notification of dismissal was implemented means that none of the usual actions associated with the fair and reasonable treatment of employees in such situations were present.

**Given the inherent unfairness in the determination and implementation of the redundancy it can not be said that the redundancy was genuine. I find that the dismissal of Ms Chen by reason of redundancy to be unjustified.**

### **Remedies**

[25] As set out above I have found Ms Chen's dismissal to be unjustified and she is therefore entitled to remedies. Ms Chen does not seek lost wages but has asked only for compensation for the hurt and humiliation arising from her dismissal.

[26] I accept Ms Chen was upset by her dismissal. This is evidenced by the letters she wrote to Mr Rakich following her termination and the heated discussion on 5 April 2006 when Ms Chen challenged the decision to dismiss her and the immediate engagement of the new employee the day after her dismissal.

[27] I am bound by section 124 of the Act to consider the extent to which Ms Chen's actions contributed towards the situation that gave rise to her personal grievance and if those actions so require to reduce the remedies that would otherwise have been awarded accordingly.

[28] I am not satisfied it is just to reduce the remedies in this case. Ms Chen's actions have not contributed towards the situation that gave rise to her personal grievance.

**Polar Food Distributors Limited is ordered to pay to Ms Chen \$5,000 without deduction pursuant to section 123(1)(c) of the Employment Relations Act 2000, within 28 days of the date of this determination.**

### **Costs**

[29] As neither party was represented by professional representation, I do not expect to be asked to address costs, however, Ms Chen is entitled to reimbursement of her filing fee.

**Polar Food Distributors Limited is ordered to pay to Ms Chen \$70 as reimbursement of her filing fee within 28 days of the date of this determination.**