

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 418/10
5298163

BETWEEN ALICE CLOTHIER
Applicant

AND FASHION TRADERS
LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Kerry Single for Applicant
Tim Hence for Respondent

Investigation Meeting: 2 September 2010

Determination: 21 September 2010

DETERMINATION OF THE AUTHORITY

[1] Ms Alice Clothier was employed by Fashion Traders Limited (FTL) for 8 years as a Sales Consultant/Professional. Ms Clothier sold fashion and household merchandise by way of door-to-door selling from a van.

[2] On 19 December 2009 Ms Clothier was handed a letter by Mr Tim Hence, the sole director and an owner of FTL, detailing a possible restructure of her role. The letter advised Ms Clothier that it was proposed to outsource the sales role for the Tauranga region to a third party company and that that company would provide sales consultants on a contracting basis rather than as employees. The letter asked Ms Clothier to consider the proposal and provide her feedback.

[3] Ms Clothier asked if she could take some time to seek legal advice and told Mr Hence that as it was just before Christmas she would need time to talk to the right people to get advice and she requested more information.

[4] Mr Hence says he told Ms Clothier that there was no more information. Ms Clothier recalls Mr Hence telling her he had not actually got all the information together as this was just a proposal and it might not go ahead.

[5] Mr Hence and Ms Clothier next spoke two days later when Mr Hence asked Ms Clothier for feedback on the proposal. Ms Clothier, rather than give feedback repeated her request for full information so that she could seek advice.

[6] Ms Clothier asked Mr Hence what would happen if the proposal went ahead and she did not accept what was required. Mr Hence reiterated that the proposal may not go ahead.

[7] Then two days later (two days before Christmas) Ms Clothier received a call from Mr Hence and asked to return to her home. On his arrival, Mr Hence handed her a letter which thanked Ms Clothier for her feedback and advised Ms Clothier that her position was redundant. Ms Clothier was given four weeks notice, but was not required to work out the notice period.

[8] Ms Clothier was dismissed by reason of redundancy. Ms Clothier claims that dismissal was unjustified and seeks remedies including reimbursement of lost wages and compensation for hurt, humiliation and distress.

[9] The issues for the Authority are whether the dismissal by reason of redundancy was justified and if not, what (if any) remedies should be awarded.

Was the dismissal justified

[10] In its reaching conclusions the Authority is required to scrutinise FTL'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.

[11] The test of justification does not change the longstanding principles about justification for redundancy¹.

[12] The Authority must be satisfied on two general points – that the business decision to make a position redundant was made genuinely and not for ulterior motives; and that the respondent acted in a fair and open way in carrying out that

¹ *Simpson Farms v Aberhart*, unreported, Employment Court, Colgan CJ, [2006] 1 ERNZ 825.

decision – particularly, did it consult properly about the proposal to make Ms Clothier redundant and otherwise act in a way that was not likely to mislead or deceive her, that is, in good faith?

Was the redundancy for genuine commercial reasons

[13] The Court of Appeal in *GN Hale & Son Ltd v Wellington Caretakers IUOW*², cemented an employers right 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 the right to continued employment if the business could be run more efficiently without him.

[14] Further, the Employment Court in *Simpsons Farms*³ reiterated the right of an employer to make genuine commercial decisions relating to how its business operations will function including decisions to make positions or employees redundant. A genuine redundancy is determined in relation to the position, not the incumbent⁴.

[15] Mr Hence says the company needed to be restructured for financial reasons. Mr Hence told the Authority in his oral evidence that the sales roles were to be contracted out to another company called Easy Group Limited (EGL). A check of the companies register shows that Mr Hence is a 50% owner of EGL. Mr Hence wanted to have only fixed costs associated with the sales roles so that he only paid for the service he used.

[16] Mr Hence says that at the time he was consulting with Ms Clothier about the restructure he was in talks with EGL to finalise the contract but that this was not completed until January 2010.

[17] It was common ground that Mr Ken Fritten drove the FTL truck from 11 – 18 January 2010. Mr Fritten was engaged by EGL and paid on a retainer. From 18 January – 18 February Mrs Jackie Fritten took over driving the truck from her husband. Mrs Fritten was also engaged by EGL. The truck was then delivered to another person, engaged by EGL, who drove the truck and did sales from it.

² [1991] 1 NZLR 151.

³ *Supra* n 1.

⁴ *NZ Fasteners Stainless Ltd v Thwaites* [2000] 1 ERNZ 739.

[18] It is clear the purpose of the restructuring was to reduce costs to Mr Hence. In the letter he delivered to Ms Clothier he explained that 2009 had been a tough and challenging year and that the profitability of FTL had been impacted on by the effects of the global economic climate.

[19] I am satisfied the redundancy was for genuine commercial reasons. Mr Hence's unchallenged evidence is that FTL no longer employs any staff.

Was the process used fair and reasonable and in good faith?

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

[21] Under the duty of good faith FTL was required to provide Ms Clothier with access to information:

- relevant to the continuation of her employment,
- about the decision, and
- an opportunity to comment on the information

before a decision adversely affecting her employment was made.

[22] Ms Clothier asked several times for more information. However, I am satisfied that in this case she was in possession of nearly all the information available at the time. Mr Hence had set out clearly in his letter on 19 December that he was:

- looking to contract out the sales role to a third party;
- looking to return the company to a more profitable position; and
- looking at options which could result in significant changes to the way FTL did business.

[23] I note however, that Mr Hence did not disclose to Ms Clothier that the third party he referred to was EGL. Mr Hence has a 50% shareholding in EGL and is one of its two directors. This was information relevant to the decision to restructure and ought to have been disclosed when Ms Clothier requested additional information. As

a director Mr Hence may have been in a position to assist Ms Clothier to take up the offer of being engaged by EGL. This could have been discussed between them during the consultation process if Mr Hence had informed Ms Clothier of his involvement.

[24] Also, the speed with which Mr Hence worked through the process of consultation with Ms Clothier seems unduly rushed. It was not until 11 January that Mr Hence formalised any arrangements with EGL. Mr Hence told me at the investigation meeting that when he met with Ms Clothier on 23 December he still did not have a contract in place.

[25] Ms Clothier asked for time to seek legal advice, something she repeated to Ms Hence on 21 December. Given the time of the year plus the fact that no formal arrangements had been put in place it seems to me Mr Hence ought to have given Ms Clothier more time to seek the advice she had told him she wanted. Mr Hence had time to put realistic timeframes in place to allow Ms Clothier to seek legal advice.

[26] The consultation process used by Mr Hence was fatally flawed. In *Communication & Energy Workers Union Inc v Telecom NZ Ltd*⁵, 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*⁶. In particular, the Court noted:

- (a) Consultation requires more than mere 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 views.
- (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 or even start anew.

[27] In this case, Mr Hence consulted for less than a week. Ms Clothier had four days notice that her position was possibly disappearing. She enquired twice about additional information. She also made Mr Hence aware on those occasions that she

⁵ [1993] 2 ERNZ 429.

⁶ [1993] 1 NZLR 671 (CA).

wished to seek legal advice before discussing the proposals with him. Ms Clothier never had the opportunity to seek independent legal advice and was therefore, never in a position to provide any considered feedback on the proposal.

[28] Standing back and considering all the circumstances of this matter objectively, I find FTL did not act as a fair and reasonable employer would have acted. I find Ms Clothier's dismissal by reason of redundancy to be unjustified and she is entitled to a consideration of remedies.

Remedies

[29] As set out above, this was a redundancy carried out for genuine commercial reasons. It follows that Ms Clothier can not be compensated for the loss of her job. However, she can be compensated for the failure by FTL to act fairly and reasonably in implementing its decision to restructure the business.

[30] In all the circumstances of this case an appropriate award is \$3,000.

[31] When determining remedies the Authority is required to take into account any contribution by Ms Clothier to the actions giving rise to her grievance. Ms Clothier has not contributed to the actions of FTL in this case and therefore the remedies will not be reduced.

Costs

[32] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the Ms Clothier may lodge and serve a memorandum as to costs within 28 days of the date of this determination with any reply submissions being lodged within 14 days of receipt. I will not consider any application outside that timeframe without prior leave of the Authority.

Vicki Campbell
Member of Employment Relations Authority