

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 130/09  
5148282

BETWEEN                      BETTY COOPER  
   Applicant  
  
AND                                THE STEPPING STONES  
   NURSERY LIMITED  
   Respondent

Member of Authority:      P R Stapp  
  
Representatives:            Patrick Mooney for Applicant  
   Peter Groves for Respondent  
  
Investigation Meeting:      6 August 2009 at New Plymouth  
  
Affidavits received by:     24 August 2009  
  
Determination:              10 September 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]      Betty Cooper was employed for 8 years as a nursery hand with her employer, Stepping Stones Nursery Limited. The parties had a signed employment agreement. Mrs Cooper's tasks included trimming, weeding, cutting, and harvesting. Her duties also listed propagating.

[2]      On 1 August she was handed a letter signed by Mr Laurence Frost, the production manager, and Mr Jason Findlay, the operations manager. This letter put her on notice of a rationalisation of the business impacting on her position, which could include redundancy. She claimed that the information meant that she was going to be made redundant.

[3] She then attended a meeting on 1 August 2008 where there was an explanation of the proposal given. Mrs Cooper arranged for a representative to attend the next meetings. Also, she had time before the next meeting to arrange representation and to consider a response. There is a document that was produced that supports that the proposal was at least read out to her.

[4] Messrs Laurence Frost, production manager, and Jason Findlay, operations manager, deposed that they explained to Mrs Cooper the need to rationalise the business, that there were financial difficulties in America and Europe that were causing a down turn in sales, and that increased levels of stock needed to be held.

[5] The next letter dated 5 August requested Mrs Cooper's thoughts and feedback on the proposal including that if there was any decision to disestablish Mrs Cooper's position the company would assess re-deployment options.

[6] Another meeting followed on 7 August. Mrs Cooper says her representative, David Dodunski, a field hand, attended that meeting and says he asked some questions without getting adequate answers about her job continuing to exist, up-skilling, re-employment opportunities and redeployment. Mr Dodunski deposed that he did attend but did not comment any further on what happened. Messrs Frost and Findlay denied not answering his questions. I hold that Mrs Cooper and Mr Dodunski cannot claim as a criticism that that they never got an answer as to whether or not her job would continue to exist because that had not yet been decided. The letters putting the proposal and inviting consultation support that conclusion

[7] On 12 August there was another meeting attended by Mr Dodunski. Mrs Cooper says she left that meeting before any discussion when she became sick. Messrs Frost and Findlay deposed there was some discussion before she left the meeting. Mr Dodunski deposed that Mrs Cooper was upset and he needed to comfort her.

[8] After the meeting a decision was then made to rationalise the business and that it would take effect from 25 August. This decision was announced at the meeting held on 12 August. This meant that Mrs Cooper's position would be disestablished, but she still had an opportunity for any further comment.

[9] Between 12 and 22 August redeployment options were apparently explored. Mr Frost deposed that there was a discussion that he would contact local nurseries for any positions available, but did not go on to say what happened and whether or not he made any contacts. However, Mr Findlay deposed that Mr Frost would contact other nurseries in the area to see if there were vacancies and says that this was confirmed in a letter dated 19 August. That letter stated a different situation because it reads as follows:

*“...Since our meeting last week we have been exploring possible redeployment options for you within the Company, and we are continuing to do so. If we are unable to redeploy you, then you would be made redundant.”*

[10] At the meeting held on 22 August that was attended by Mr Dodunski it was confirmed that Mrs Cooper's position would be disestablished. Mrs Cooper did not attend the meeting on 22 August because she was sick. An announcement was made that there were no redeployment options available for Mrs Cooper.

[11] A letter dated 22 August confirmed the redundancy and the last pay details were provided. Mrs Cooper's last day working at Stepping Stones was 25 August. Other people's jobs were affected at the same time, but two of them resigned and others were deployed for retraining because of their skills and willingness to work in the areas that Mr Groves says Mrs Cooper was not willing to work in. One example included spraying. Mr Groves says that he understood Mrs Cooper was not interested in other options for up-skilling and redeployment. He says she wanted money to exit, which she was not entitled to under her employment agreement. She denied that claim. That claim from Stepping Stones was never raised earlier, except in reply by Mr Frost. Her claim was not referred to anywhere else except that the company's lawyer's confirmed correctly that she was not entitled to any redundancy compensation under her employment agreement.

[12] Mrs Cooper has complained about the selection process and that other options, such as, up-skilling and retraining and part time employment were not considered when other workers, who had shorter periods working for Stepping Stones, and casual workers, were kept on. She claimed that two casuals were made permanent at the

time, but Stepping Stones says the employment arrangements are not casual and they were employed because they had more qualifications than Mrs Cooper.

[13] Mrs Cooper says also that other workers have since been employed in jobs that she and other redundant workers used to carry out. Mr Groves says that there are now fewer workers in the total workforce. Mr Findlay explained that Stepping Stones employed seasonal youth workers for spring grafting and during the school holidays and employed skilled workers from overseas for commercial exchanges and experience for brief periods.

[14] Ms Cooper's lawyer requested the employer's reasons for the redundancy decision and these were provided in a letter dated 7 October 2008. The request caused Mr Groves to get legal advice and he says options were obtained on how to respond to Mrs Cooper's lawyer. The explanation provided in the letter dated 7 October did not satisfy Mrs Cooper, and following another exchange of letters, where she was accused of undertaking a "fishing expedition", she informed Stepping Stones that she would seek the assistance of the Department of Labour. The Department did not pursue Mrs Cooper's request once it was informed that Stepping Stones was unwilling to attend mediation.

### **Issues**

[15] Was the redundancy for genuine commercial reasons? Was the decision predetermined? Did the employer consult? Was there a fair process? Did the employer consider all the alternative options? Has the employer put the applicant to the cost of an investigation by being unwilling to attend mediation?

### **Was the redundancy for genuine commercial reasons?**

[16] There were genuine commercial reasons for Stepping Stones to rationalise the business. The evidence that supports this conclusion includes:

- The names of a number of people were included in an interview list.
- Correspondence providing notice of the need to rationalise and that a proposal existed.

- Legal advice on what the company could do being sought and provided.
- Mr Groves, director of the company, says he had an involvement in the preparation of the proposal document. He gave knowledgeable comments about the proposal and the circumstances impacting on the company.
- Documentation now available to support the genuineness of the commercial situation faced by the company.
- Financial difficulties.
- There are today fewer workers in the company's total workforce.
- A document was prepared that had an outline of the company's situation and was referred to by Messrs Frost and Findlay at the first meeting.

[17] The company's letter dated 1 August supports the intention to consult Mrs Cooper on the circumstances and the proposal. I am satisfied that the general nature of the information in that letter was sufficient to show Mrs Cooper that there was a genuine commercial situation affecting the company. It did consult that there was a need for a rationalisation that could impact on jobs, including Mrs Cooper's job. There were meetings for that purpose. This was also supported by the document read out during at one of the early meetings that provided background information on the trading difficulties the company faced.

### **Consultation about rationalisation and retraining**

[18] I am satisfied that there was some discussion about rationalisation and retraining because:

- Mrs Cooper deposed that there was discussion about rationalisation.
- Mrs Cooper refers to retraining in her written evidence,
- She denied Mr Findlay's claim that she did not want to retrain.
- She also deposed that she did not want to do spraying and explained that she was conscious that there might be health issues, but that she was happy to do anything else that could be offered.
- Mr Dodunski deposed that he commented on spraying. There was a discussion about Mrs Cooper working with another person and Mr

Dodunski deposed that he did say that there were other jobs that may be available including working with that other person. He says he was informed that that person did not want to work with Mrs Cooper.

**Did Mrs Cooper reasonably conclude that the decision had already been made?**

[19] I hold that Mrs Cooper could not have reasonably considered from the 1 August letter that her position was redundant (as she has said in her written statement) before being consulted. The letter cannot be interpreted that way. I accept that she may have felt that that would happen, but that does not mean that Stepping Stones was being disingenuous or had predetermined the outcome. The further correspondence on 5 August and the meetings of 7 and 12 August support my conclusion.

**The procedure followed by Stepping Stones-consultation on selection and criteria**

[20] I accept that the company was genuinely well intentioned. However despite the legal advice it received it has a problem about how it consulted on the criteria for selection and alternative options.

[21] I find it has not been able to satisfy me that as a fair and reasonable employer that it properly consulted Mrs Cooper on selection. It seems an assessment of sorts was done by Mr Findlay and Mr Frost at the time, given that the documentation now provided has identified names of other employees and their qualifications, skills and willingness to carry out other tasks (Mr Findlay's reply). That information was not provided in any sufficient detail on 17 November 2008 in reply to Mrs Cooper's lawyer, despite the company being advised by its own lawyer to provide an adequate level of detail. Stepping Stones has not substantiated its claim that the selection process was fair because:

- There was no reference to the selection process before Mrs Cooper's lawyer asked for information requesting the reasons for the decision.
- No reference was made to any selection process and criteria to be relied upon in the letters dated 1 August, 5 August and 19 August.
- Messrs Frost and Findlay were vague about it until their replies provided in writing after the Authority's investigation meeting.

- There has been no comparative information provided by Stepping Stones regarding the selections to support the criteria used until after the decision was made, and the information has been produced during and after the Authority's investigation meeting: Messrs Frost's and Findlay's replies. There was no contemporaneous record at the time.
- The criteria were never outlined for Mrs Cooper to have any input before the decision.
- The first time that selection criteria were referred to was in the letter dated 7 October, after the dismissal.
- Mrs Cooper genuinely believing that the selection had more to do with her age than the criteria the company says it has relied upon to base its selections on.
- Mrs Cooper requested information about what the company meant when it said in the letter dated 7 October 2008 "... *the selection criteria used was those nursery workers without specialist propagation skills*", which makes it more than likely that there was no proper explanation and opportunity for her to have some input before the decision was made.

[22] Thus, Stepping Stones failed to meet the requirement to properly consult on the selection and the application of the criteria.

[23] This is fatal in this case because Mrs Cooper and Mr Dodunski raised suspicions in their statements about who were actually chosen to remain and for what reasons and Mrs Cooper has come away with a genuine belief that age was the basis of selection. Messrs Frost, Findlay and Groves were able to satisfy me that but for her age her position would have been made redundant due to restructuring and on the basis of skills, qualifications and any willingness to retrain.

[24] Messrs Frost and Findlay had an obligation to do more than the consideration they gave to selection, including telling Mrs Cooper what the criteria were and giving her an opportunity to have full input into the selection. They have not satisfied me that they did this.

[25] Mrs Cooper could not contradict the company's evidence that its employment arrangements did not include casuals and part timers given her own employment agreement and Mr Groves's knowledge of his own business. Mr Groves was supported by Mr Findlay's evidence that there were fixed term arrangements made to cover a few months and to cover tasks of a physical nature. I was informed by Mr Groves that all employment arrangements were fixed term arrangements, but I was not provided with any documents and details to scrutinise the contractual arrangements in regard to the instances that have been referred to by both parties on the employment of other people. I was not convinced by Mrs Cooper's assertions that other casual and part time employees with less service were unfairly selected where at the barest of thresholds the evidence does support that it was more than likely that Messrs Findlay and Frost made some assessment on skills and qualifications. Therefore I find age was not the basis of the decision.

[26] I hold that their primary focus was to consult Mrs Cooper on the need to rationalise, but they neglected to cover off properly with her their selection and application of the criteria in the context of any discussions they say they had with her on skills and the willingness to retrain and be involved in other nursery work.

[27] Without any documentation of selection and the application of criteria recording individual circumstances I can only conclude that the assessment was made without it being open and transparent and because of this, it is understandable that Mrs Cooper was suspicious. It is not fatal that an employer conduct its affairs without any documentation, but if there is none, then it is more difficult for the employer to substantiate its processes, especially where the parties provide conflicting evidence as has happened here.

### **Consultation on alternative options**

[28] The above conclusions lead me to find that Mrs Cooper was not adequately consulted on all the alternate options including job sharing, working fewer hours and being offered other work if it became available. Redeployment became the employer's only focus at the time since it was the only option referred to. Of course redeployment would be an option that a fair and reasonable employer would be expected to consider, but also a fair and reasonable employer would have covered off

other options too, considering that there is some history of fixed term arrangements and seasonal work. There were insufficient details provided of the redeployment considerations and conflicting evidence about what was done.

### **Conclusion**

[29] I am left with the conclusion that Stepping Stones, despite the best intentions and advice, did not properly disclose all the information to Mrs Cooper that a fair and reasonable employer would be expected to disclose to consult her on options and selection and applying the criteria to be used, until after the event.

[30] That does not accord with the requirements to act in good faith and properly consult. The inadequate execution of consulting on the selection and applying criteria and alternative options, despite the genuine commercial reasons to make changes, means that Mrs Cooper has a personal grievance.

### **Remedies**

[31] Because there was a genuine redundancy situation impacting on a number of employees, including Mrs Cooper, I am not satisfied the outcome would have been any different given the employer's decision. Thus, I cannot award any compensation for lost wages.

[32] I am satisfied that Mrs Cooper has made out a claim for compensation for humiliation, loss of dignity and injury to feelings for the impact on her of the employer not being fully open and communicative. It is unclear whether or not Mrs Cooper got upset at the meetings she attended. The fact that she did not attend the meeting on 22 August would suggest that she was upset. Mr Dodunski deposed that she was upset, that she needed comforting, that there was some tension at the meeting and he needed to ease that, and he says she had tears in her eyes. Messrs Frost and Findlay denied that she was crying. Any upset appeared to relate to the loss of her employment, I hold, but because no decision had been made before 19 August, I am satisfied some of the upset would have been because of the inadequate procedure being followed by the employer, which required more openness and the proper consideration of options, selection and applying the criteria being relied upon. I have

not included any compensation for being sick because Mrs Cooper acknowledged she had been unwell before these events. There was no contributory fault: applying s 124 of the Act.

[33] If Mrs Cooper made any demand for money that has no relevance to my finding because the responsibility rested on the employer to fulfil its obligation of being open and communicative. An employee has every right to ask for compensation, but given the absence of a contractual entitlement the employer also has the right to refuse it.

[34] Compensation is not a penalty and is not compensation for the loss of the job but is to compensate Mrs Cooper for the impact on her of the employer's failure to properly discuss and consult on options, selection and applying criteria for selection.

[35] I accept that there was an impact on her with her feelings being hurt. I assess her compensation as \$2,000 pursuant to section 123 (1) (c) (i) of the Act.

### **Costs**

[36] Mrs Cooper is entitled to costs as she has been successful. She is in receipt of legal aid. Costs follow the event as a matter of principle as the applicant has requested a contribution. I am satisfied that a contribution to her costs should be \$2,000 since the respondent was unwilling to attend mediation to save costs. The employer's decision not to use mediation was most unfortunate considering that the employment agreement makes provision for a process to resolve employment relationship problems and the focus of that is very much on solving their own problems by talking to each other and participating in mediation. There is no mandatory requirement for either party to go to mediation but the benefits mean that the discussion of many options, including talking about risks and making assessments with the involvement of a third party, must be beneficial instead of incurring costs in litigation and investigations. An employer does not have to pay money to fix problems and if there is any defence to a problem then the other side need to carefully consider the situation.

[37] Mrs Cooper was represented and I am satisfied that representation was required to pursue this matter because of the employer's attitude to mediation and its refusal to share openly information until the intervention of the Authority and where the employer accused Mrs Cooper of undertaking a "fishing expedition" for information. Her representative needed to prepare to assist the Authority conduct the investigation. Both parties have added to the costs in the way they have dealt with the Authority's investigation. The employer did not arrange for key witnesses to be present and instead I have had to rely on affidavits and declarations. Documents were delivered late. My assessment of a sum for a contribution for costs is based on a tariff range given the nature of the employment relationship problem. Mrs Cooper has also incurred the cost of a filing fee.

### **Summary of orders of the Authority**

[38] I order Stepping Stones Nursery Limited to pay Mrs Betty Cooper \$2,000 compensation under s 123 (1) (c) (i) of the Act and \$2,000 costs plus the filing fee of \$70 under clause 15 of Schedule 2 of the Act.

P R Stapp  
Member of the Authority