

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 88/10
5161112

BETWEEN JOANNE MARIE DOUGLAS
 Applicant

A N D MILLBROOK COUNTRY
 CLUB LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Simon Stammers-Smith, Counsel for Applicant
 Don Rhodes, Representative for Respondent

Investigation Meeting: 15 December 2009 at Queenstown

Determination: 9 April 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Joanne Douglas worked for Millbrook Country Club (Millbrook) from June 2000 until November 2008. By the time the employment ended Ms Douglas was working around 30 hours per week Monday to Friday. In November 2008, Ms Douglas' employment was terminated purportedly for redundancy. Ms Douglas says that her dismissal was unjustified because Millbrook predetermined her dismissal rather than properly consulting with her about a proposed restructuring; that it acted in a deceptive manner by dismissing her for reasons other than for those stated; and that it failed to consider and offer her any alternative position or the usual redundancy support. All that gives rise to claims for penalties and compensation.

[2] These allegations are all denied by Millbrook which says that it terminated Ms Douglas' employment genuinely for redundancy after properly consulting with her about the redundancy situation.

[3] To resolve this problem, I will first explain an earlier dispute between Ms Douglas and Millbrook over her rate of pay before canvassing the events leading up to the announcement of Millbrook's decision to terminate Ms Douglas' employment for redundancy. I will then assess Millbrook's decision to dismiss Ms Douglas against the test of justification of a dismissal.

The earlier dispute

[4] Katy Marsten-Key was Millbrook's HR manager and Ms Douglas reported to her as the HR coordinator. Ms Marsten-Key worked about 30 hours per week. She gave notice and finished about June 2008. Ms Douglas says that prior to leaving, Ms Marsten-Key and Millbrook's managing director met and agreed to a pay increase for Ms Douglas while she was to act as HR manager pending the recruitment of a new HR manager and a lesser increase applicable on the resumption of her usual duties after the appointment of the new HR manager. Ms Douglas says that she was later told by the managing director that he was rescinding this agreement.

[5] David Onions is Millbrook's general manager. He says that Ms Marsten-Key recommended pay increases for Ms Douglas and that the managing director sought to negotiate with Ms Douglas about this but had to return to Japan before concluding these discussions. Mr Onions says that he then reached a compromise agreement with Ms Douglas. Before that was implemented, Ms Douglas sent an email to the managing director who replied proposing a meeting to discuss matters. Rather than meeting, Ms Douglas instructed a solicitor who wrote to Millbrook on 29 October 2008 raising a personal grievance about Millbrook's failure to pay Ms Douglas at the rate she says was originally agreed. Payment of arrears was sought as well as a sum towards legal costs.

[6] Millbrook replied by letter dated 12 November 2008. By dint of Millbrook's response, the dispute about the pay rate and arrears was resolved but not the claim for costs. Millbrook eventually paid the sum claimed for costs following mediation after these proceedings were initiated. As a result, it is not necessary for me to make any findings about this dispute at this point other than to observe that Ms Douglas says that the dispute is a reason for her subsequent dismissal. To reiterate, her solicitor wrote about this dispute in October 2008 and Ms Douglas was dismissed less than a month later.

The dismissal

[7] Mr Onions' evidence, which I accept, is that during the first quarter of the 2008/2009 financial year, Millbrook felt the effects of the worldwide economic recession resulting in a significant forecast reduction in visitor numbers. The projected fall in revenue required cost-cutting measures including staffing reductions. There were a total of nine redundancies across several departments at around the same time as Ms Douglas' redundancy.

[8] Brian Howie is an experienced HR manager. He was recruited from overseas and started work full time at Millbrook in early October 2008. Ms Douglas is critical of whether Millbrook adequately considered local candidates but it is not my role here to second guess the merits of an employer's decision to employ one person over another. Nor is it my role to assess whether there was proper compliance with immigration work visa requirements. I will proceed on the basis that Millbrook was entitled to appoint Mr Howie to the vacancy.

[9] Mr Howie's evidence, which I accept, is that he proposed moving the payroll function from the finance department to the HR department in order to achieve better management control and consistency over pay rates and recruitment. This could also result in a reduction in staff numbers. At a meeting with staff of the finance department on Tuesday, 18 November 2008, Mr Onions advised them about a restructuring proposal that included making the position of finance controller redundant and moving the payroll officer to the HR department. It was intended that Mr Howie would meet with Ms Douglas at the same time to brief her on these proposals and the possibility that her position as HR coordinator might be made redundant. However, Ms Douglas was unwell that day so she was not at work.

[10] After Mr Onions' meeting with the finance department, Ms Douglas received two calls at home that evening from staff who had been present. They apparently told her that the payroll officer (Linda Williams) was moving to the HR office and would sit at Ms Douglas' desk. This information is the seed of Ms Douglas' contention that Millbrook predetermined her dismissal. Prior to this, Ms Douglas knew generally of the business downturn and of restructuring affecting other departments at Millbrook, but she had not known anything of a restructuring affecting her position.

[11] Ms Douglas was at work as usual on 19 November. Later in the morning, Mr Howie asked her to meet with him in his office. Ms Douglas' evidence is that Mr Howie told her about the redundancy of the financial controller, Ms Williams' move to HR and the decision to keep the number of staff in HR at two. Ms Douglas was told that because Ms Williams had the payroll experience, it was Ms Douglas' position that was at risk of redundancy. Ms Douglas said in evidence that Mr Howie told her that Ms Williams' payroll experience would make her the *preferred candidate*; that she asked about her own HR experience but cannot recall Mr Howie's response; but that he said that the payroll experience was more important.

[12] Mr Howie's evidence differs a little from Ms Douglas' evidence about this meeting. To the extent of any conflict, I prefer his evidence. It is as follows:

I explained the context of the restructuring and that the Payroll function was to now come under the responsibility of the Human Resources Manager.

I explained that I did not believe that I would have a requirement for 3 people within the department and that I proposed to have one role that combined the Payroll Officer's duties and HR Administration. I explained that the bulk of this role would require a technical payroll competence and that HR Administration would be a lesser role. We now had a full time HR Manager rather than a part time resource. Therefore I believed Linda Williams was the most likely candidate to be in the combined role due to her 6 years of Payroll experience.

I offered Joanne the opportunity to comment and explained that I wanted to have a meeting with her later in the week with her representative once she had the chance to consider what I had proposed.

Joanne immediately said that her Lawyer had told her she would have a strong case against Millbrook if she were made redundant. This was clearly a reference to her earlier grievance. She then left the office without further comment.

She was not required to be at work until the meeting on Friday as we understood that anyone with their position "at risk" of redundancy needs time to reflect on the proposal and consult their representative. This is consistent with how we dealt with all those who were at risk of redundancy.

I wrote Joanne a letter confirming our discussion and inviting her to a meeting with her representative the following Friday 21 November. The letter was hand delivered to her house that day to ensure she had enough information and time to prepare for the meeting on Friday.

[13] This second meeting was held on Friday, 21 November. Present were Ms Douglas, her brother-in-law, Mr Onions and Mr Howie. Ms Douglas elected to

proceed with her brother-in-law's attendance knowing that he would covertly tape record the meeting. Ms Douglas is now critical of the fact that this meeting occurred before she could get legal advice. There is no merit in this criticism. Mr Howie's letter of 19 November clearly indicates her entitlement to representation and suggests that she should contact him beforehand *if Friday's meeting is not convenient for you*.

[14] I accept Mr Onions' and Mr Howie's evidence that they outlined the rationale for the proposed redundancy. Ms Douglas declined to comment on the basis that they had already made up their minds. The meeting ended with Ms Douglas to seek legal advice and then contact Millbrook at the beginning of the next week to arrange a further meeting. Ms Douglas' evidence is that she went to the Friday meeting with an open mind; that she knew that there were vacancies in other departments and was confused when there was no mention of them; and that they should have discussed the new position with her but they did not. I do not accept Ms Douglas' evidence about her approaching this meeting with an open mind. If she had, she would have raised these issues herself. Her evidence is also inconsistent with her refusal during the meeting to comment.

[15] At the end of this meeting, Ms Douglas said she was going to the HR office to collect a couple of things. Mr Howie asked her *what about your keys*; Ms Douglas said she would leave them on her desk and lock the door behind herself. Ms Douglas is critical of Mr Howie for asking for her keys. She says that her keys should not have been an issue time since she had not been made redundant at that time. Mr Howie's evidence is that Ms Douglas had one of only two sets of keys to the office which is why he asked her for them. I will return to the point later. I infer that no one was present in the HR office when Ms Douglas went there. Ms Douglas discovered that her access to emails on the computer had been restricted. It was also apparent to her that Ms Williams was doing HR coordination work.

[16] Ms Douglas did not contact Millbrook on Monday, 24 November but she simply arrived to work at her normal time on the Tuesday. Ms Williams was in the HR office. She rang Mr Howie to report Ms Douglas' arrival. Mr Howie then rang Ms Douglas who told him she was reporting for work as normal. Mr Howie mentioned his understanding about the need for a further meeting. Ms Douglas said she wanted to meet straightaway. This meeting followed, attended by Ms Douglas with the executive housekeeper for her support and Mr Onions and Mr Howie for

Millbrook. I accept the evidence that Ms Douglas insisted on proceeding with the meeting despite Millbrook asking about the absence of her lawyer. While Ms Douglas is critical of Millbrook for not offering her any alternative work or a reference, her evidence is that she did not raise either topic during this meeting. Ms Douglas did ask about her computer access and was told it was restricted for security reasons. Ms Douglas then said that she needed a decision about whether or not she was redundant. Mr Howie said they would discuss the matter and write to her to advise her of their decision. The meeting ended.

[17] Mr Howie wrote to Ms Douglas a letter dated 25 November setting out this decision. It reads as follows:

Dear Joanne

I am writing further to our meeting on Friday 21st November and our subsequent meeting this morning that you insisted you wished to hold without your legal representative present. I can now confirm that regrettably your position as HR Coordinator at Millbrook has been made redundant.

David and I have considered the points you raised on Friday's meeting. As we advised you there is a need for us to achieve cost savings in our support departments and by bringing together the HR and Payroll Departments we will be able to combine the roles of HR Coordinator and Payroll Officer. I advised you that in this new position there is a critical need for Payroll expertise as well as an ability to carry out the HR Administration role. I believe that Linda Williams has this necessary expertise in payroll and therefore to achieve cost savings required we have concluded that your position as HR Coordinator is redundant.

You said on Friday that you felt that this decision had been predetermined and that the process was unfair. I did emphasise to you on Friday and at today's meeting that we were in a consultation process and that we were looking for you to comment on the proposal we have made. Unfortunately you have not raised anything that has made us reconsider this proposal and therefore you will regrettably be made redundant with effect from today.

You will be paid up to and including 25th November and in addition will receive 4 weeks pay in lieu of notice and a payment for any accrued holidays. This will be paid into your bank account on Thursday 27th November. I would be grateful if you could ensure that any items of Company property are returned to me as soon as possible.

I would like to thank you for your contribution to Millbrook over the last 8 years and wish you every success for the future.

*Yours sincerely,
Brian Howie*

[18] By letter dated 16 February 2009, Ms Douglas' solicitor raised a grievance about the dismissal. It is alleged that Millbrook had already made up its mind about redundancy by 19 November when the matter was first raised with Ms Douglas. The request for Ms Douglas' keys and her visit to the HR office is wrongly identified as having occurred on 19 November. There is then mention of the 25 November but not the 21 November meetings. Millbrook is criticised for not discussing the possibility of alternative positions or offering job search assistance or a reference. It is claimed that Ms Douglas' position was given to the payroll officer because of the earlier dispute over pay rates. There is criticism of Millbrook's failure to consult in good faith.

Justification

[19] Whether a dismissal is justified must be determined objectively by considering 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.

[20] One of the principal arguments for Ms Douglas is that she was singled out to be dismissed because she enforced the alleged agreement about wage increases in October 2008, shortly before her dismissal. Although it was not advanced before me in the following terms, I am mindful that Ms Douglas' dismissal could be treated as a discrimination grievance pursuant to s.107(1)(b) of the Employment Relations Act 2000. That gives rise to a rebuttal presumption of discrimination: see s.119. However, the evidence very clearly establishes the existence of a genuine redundancy situation that was the motivation for the dismissal of Ms Douglas.

[21] Financial losses, particularly as compared with budget, in the several months prior to November 2008 caused management to focus on possible cost savings, including staffing reductions. As noted, that affected several departments across the business. Sometime after he arrived Mr Howie formulated a proposal in light of the financial situation. There was a compelling logic to his proposal. Having the payroll officer report to him gave HR better control of staffing costs. A full time payroll officer could readily undertake some HR administration work while Mr Howie could deal with any higher level HR coordination tasks. It must be remembered that he was a full time replacement for Ms Marsten-Key who had worked about 30 hours per week. It would have been much less feasible to get a part time HR coordinator to

undertake the payroll function. I am satisfied that the logic of this is sufficient proof to displace any presumption of discrimination. Further, I find that Mr Howie's and Mr Onions' only motivation for the dismissal of Ms Douglas related to the redundancy situation above.

[22] The employment agreement deals with redundancy as follows:

Redundancy

10.1 The Resort may, at its discretion, reorganise or change its Resort structure. Where such reorganisation or change may result in your job becoming surplus to the Resort's requirements, or results in a significant change to your duties or responsibilities, you will be given suitable time to consider such proposal and to put forward any suggestions before any final decision to restructure is arrived at by the Resort.

10.2 Where no suitable alternative position with the Resort is available, the Resort will give you one month's notice in writing, or one month's pay in lieu of notice, as the Resort will determine. No other redundancy compensation will be paid.

[23] These contractual provisions are bolstered by the requirements of good faith, in particular the obligation to provide an employee in a position such as Ms Douglas with access to relevant information and an opportunity to comment on that information prior to any decision to dismiss being made.

[24] I find that Millbrook met its contractual and statutory obligations to consult with Ms Douglas about the restructuring proposal. It was Ms Douglas who failed to be responsive and communicative. Unfortunately, before Millbrook could convene its first meeting with Ms Douglas about the restructuring, she heard about it from others. That caused Ms Douglas to think that Ms Williams would be retained. That was indeed likely but not certain at that point. Ms Douglas thought that they both should have been equally affected by the restructuring proposal. That thinking is where Ms Douglas went wrong. As explained above, the proposal was always to disestablish the HR coordinator's role and never to disestablish the payroll officer's position. The payroll officer was going to have to pick up some HR coordination work but the whole of the payroll officer's position remained necessary to Millbrook's business. Only the HR coordinator's position was potentially surplus.

[25] Despite Millbrook's efforts to get Ms Douglas to engage with it about the proposal, she declined to do so. Ms Douglas did not raise most of her concerns

despite having ample opportunity to do so. Similarly, Ms Douglas did not put forward any suggestions about the proposal despite having the opportunity to do so.

[26] Ms Douglas makes much of Millbrook's failure to consult with her about other vacant positions. In the evidence, there is a memo dated 2 December 2008 offering a recruitment incentive to get existing staff to refer potential employees. There is also evidence that Millbrook was actively recruiting for food and beverage staff and housekeeping supervisors as at the date of the dismissal. Ms Douglas' evidence is that she was open to possibilities but I have rejected that evidence. At the time she knew about Millbrook's staffing requirements and if she was genuinely interested she could have simply mentioned those possibilities. These possibilities were very different positions, both as to the skills required and the terms and conditions of employment. In the words of the employment agreement, I find that there was no *suitable alternative position* available.

[27] Ms Douglas points to several pieces of evidence to support the contention that Millbrook predetermined its decision to dismiss her. The first is the evidence that Ms Williams was not subject to a similar consultation process. For the reasons already expressed, I do not accept that it indicates any predetermination. Second, Millbrook disabled her computer access and required her to return her key. The evidence is that Ms Douglas' computer access was restricted on 19 November, the same day that Mr Howie first spoke to her about the restructuring proposal. Ms Douglas discovered this several days later on 21 November. She also discovered that Ms Williams had been given access to her work email account.

[28] During their meeting on 19 November, Mr Howie told Ms Douglas that she was not required to report for work until Friday's meeting and that she should take the time to prepare for that meeting. Ms Douglas did not object to having this time off. In light of Ms Douglas' absence from the workplace, it is understandable that someone needed to access her work email account to deal with any business communications. I accept that giving Ms Williams such access does not mean that Millbrook predetermined its decision to dismiss Ms Douglas.

[29] The decision to restrict Ms Douglas' computer access from 19 November requires further consideration. There is evidence to show that Ms Douglas was becoming increasingly disgruntled with her employer. She resented the role taken by Mr Onions' personal assistant and the extent to which Mr Onions and his assistant

took over responsibility for work that had previously been done by her. Ms Douglas also objected to Mr Howie as an overseas candidate being appointed to the HR position when, in her view, there were suitable local candidates who were overlooked. In his evidence, Mr Onions describes Ms Douglas' behaviour from the time of his appointment as *uncooperative*. Given the tone of some of Ms Douglas' emails concerning Mr Howie's appointment, Mr Onions' evidence is probably understated. Millbrook's explanation for restricting Ms Douglas' computer access is that it needed to ensure that its data remained secure. On balance, I accept that Millbrook was genuinely motivated by that concern especially in light of the tension in its relationship with Ms Douglas. That is not a finding that there was any genuine risk but nor do I accept that restricting Ms Douglas' computer access amounts to predetermination of the decision to dismiss her.

[30] As part of the grievance there is a submission that Millbrook breached clause 10.2 of Ms Douglas' employment agreement, prior to 19 November, by allocating work previously performed by her to other staff such as Mr Onions' personal assistant. I do not accept that there was any breach of contract arising from these issues. Ms Douglas' duties and responsibilities remained unchanged throughout. All that happened was that the general manager and/or his PA personally took responsibility for some work that previously would have been handled by Ms Douglas or possibly the HR department. It is unsurprising that a new general manager might want to be more closely involved. None of that constitutes a breach of Ms Douglas' employment agreement.

[31] There is one aspect of the dismissal where Millbrook fell below the standard of a fair and reasonable employer in a redundancy situation, especially given Ms Douglas' long service. Millbrook should have offered Ms Douglas a reference, support with searching for alternative employment and constructing a CV and access to counselling or similar support to help with losing her job. This support has been well recognised in the law as a reasonable obligation on a relatively well resourced employer. I find that Millbrook's failure to attend to any of this gives rise to a personal grievance which could be categorised as either unjustified dismissal or unjustified action causing disadvantage. This is the only grievance established by Ms Douglas.

Remedies for a personal grievance

[32] There is a claim for lost remuneration. There is no evidence to establish that Millbrook's failure to provide job search assistance and offer a reference caused any lost remuneration. No award can be made.

[33] There are claims for distress compensation. I accept that Ms Douglas was somewhat upset by the lack of support shown to her when her employment was terminated. Most of Ms Douglas' evidence concerns her claim (not established) that the dismissal was predetermined. The distress properly attributable to the proven grievance calls for a modest award of compensation which I fix at \$2,000.00.

Penalty claims

[34] There are claims for penalties for alleged breaches of s.4(1)(a) and s.4(1)(b). I am also referred to s.4(4)(e) which provides that good faith duties apply when making employees redundant. Those claims cannot succeed. The only breaches of the Act which render a person liable to a penalty imposed by the Authority are those where the provision also specifically provides for a penalty: see s.113(1)(b). Penalties for failure to comply with the duty of good faith may be imposed only in limited circumstances such as when the failure was *deliberate, serious and sustained* or intended to undermine an employment relationship: see s.4A. There is no evidence so as to bring this matter within this section.

[35] There is a claim for a penalty for a breach of clause 10.1 of Ms Douglas' employment agreement. I do not accept that any breach of this provision has been proven. In any event, this problem is a standard personal grievance about justification for a dismissal. Any breach of agreement involved in the dismissal would properly be remedied by compensation for the established grievance.

Summary

[36] Ms Douglas has a personal grievance arising from Millbrook's failure to provide appropriate support when dismissing her for redundancy, but not otherwise. To remedy this grievance, Millbrook must pay Ms Douglas compensation of \$2,000.00 pursuant to s.123(1)(c)(i) of the Act.

[37] Costs are reserved. If either party needs a determination on costs they may lodge and serve a memorandum within 28 days and the other party may lodge and serve a reply within a further 14 days.

Philip Cheyne
Member of the Employment Relations Authority