

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination Number: WA 6/08
File Number: 5097865

BETWEEN DENISE MARILYN EDMONDS
Applicant

AND ALLIED PETROLEUM (NI)
LIMITED
Respondent

Member of Authority: G J Wood

Representatives: Denise Edmonds on her own behalf
Janet Copeland for Respondent

Investigation Meeting: 6 November 2007 at Napier

Submissions received: By 26 November 2007

Determination: 22 January 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Ms Denise Edmonds, claims that she was unjustifiably dismissed through redundancy because she was replaced rather than her position being surplus to her employer's (Allied Petroleum (NI) Limited [Allied]), requirements. She also claims that she was not offered alternative positions as of right compared to other staff who had been through similar restructuring exercises, that the redundancy was not implemented in a procedurally fair manner, and that she was misled and deceived in relation to requests for information, all of which were also breaches of good faith.

[2] Allied considers that Ms Edmonds was justifiably dismissed by way of genuine redundancy, that Ms Edmonds would not apply for any new roles and that overall she was treated fairly in the redundancy process.

The Facts

[3] The HW Richardson Group Limited, a family-owned group of companies based in Invercargill, with interests in concrete and fuel distribution, took a 50% interest in two North Island fuel distribution companies, R Sherwood Limited and Kiwi Fuel Line Limited, in 2002. The other half of these companies was owned by Mobil Oil New Zealand Limited. Ms Edmonds had been the office manager of R Sherwood Limited since April 1994. In 2002 she was promoted to the position of accounting manager with Sherwood. Ms Edmonds was responsible for the accounting function of both companies and was directly responsible for three administration staff.

[4] In March 2003 HW Richardson purchased the remaining 50% shareholding of both companies from Mobil Oil. It then amalgamated the two companies into Allied in May that year. Mr Callum Huddleston, who had been a seconded general manager of Sherwood from Mobil, carried on as general manager until April 2004. Mr Huddleston managed the business in the knowledge (that he passed on to Ms Edmonds) that synergies could be obtained by amalgamating certain administrative functions with a sister company (also a subsidiary of HW Richardson), Allied Petroleum based in Christchurch and with HW Richardson head office in Invercargill.

[5] Changes in the administration function had started to occur from May 2003, such as payroll processing moving to Invercargill. General ledger, financial reporting and tax matters were also important functions that had been transferred from Allied prior to the restructuring at issue here, which was to take place in April 2004. One administration staff member was not replaced, when she left in late 2003, because of the reduction in work.

[6] Mr Huddleston discussed these changes with Ms Edmonds and they agreed in principle (in early 2004) to a change to her position to that of Administration Supervisor. The fact that the positions in Hastings would need to be reduced at some later point down to two positions rather than three was always understood. No change was made to Ms Edmonds' remuneration as a result of the change in duties and title. Being Administrative Supervisor meant that Ms Edmonds lost overall managerial control of two other administrative staff, but was still responsible for their day to day supervision. Mr Huddleston noted that due to the reduction in responsibilities, the retention of the same salary by Ms Edmonds meant he believed that she now held a 'well paid' position. Her salary and benefits were worth in excess of \$57,000 a year.

[7] Prior to his departure in April 2004, Mr Huddlestone commenced a series of restructuring proposals, including logistics and sales staff, but did not deal explicitly with the administration function again.

[8] Mr Lance King was appointed as the new General Manager of Allied in late March 2004. He had extensive experience working in the HW Richardson group of companies, but has since left to take up a position with a separate employer. He was appointed to Allied because it was not profitable and had a brief to reduce costs wherever possible. This was particularly so as Allied had lost its Mobil cartage contract and margins had been squeezed. His brief came from Mr Peter Carnahan, the Managing Director of the HW Richardson group. He was told on commencement of the view by other managers, including Mr Huddlestone, that administration numbers in Hastings could be reduced from three to two.

[9] Mr King first settled on the sales and marketing area in his attempts to change costs. While there were some staff changes as a result of this, I find that they were concluded by agreement between Allied and the staff members concerned.

[10] Mr King was of the opinion that the work at Hastings could be done by two staff rather than three and that managerial responsibility for them could be taken by the Christchurch-based administration manager. At that time Ms Edmonds was the supervisor and she had two other administrative staff. One, her daughter, worked on a casual basis, and the other resigned at the end of May 2004 in anticipation of the restructuring. Mr King envisaged that the administration processing work left to be done in Hastings would also become much lower level, thus obviating the need for a supervisor and meaning that staff could be employed at lower salaries. He therefore decided on a strategy to reduce the salaries across administration by approximately \$50,000 per year. Mr King realised that this proposal might well trigger the redundancy provisions in Ms Edmonds' employment agreement. They state:

Redundancy means a situation where you become surplus to the needs of the company due to a change in the organisation, the method of operation, the closure or ceasing of some operations, or changing skills or attributes required, resulting in a situation where the company needs to reduce staff numbers or replace some staff with people possessing different skill attributes.

It may be that the company does not wish to continue to employ you in the position you currently occupy, but wishes you to occupy a different position. This will not constitute a redundancy situation where your total remuneration package is not reduced and you have the skills to undertake the work.

Redundancy only occurs if your employment is terminated because there is no alternative employment, or any alternative employment involves a reduction in your total remuneration package or a significant change in location.

[11] Mr King was aware that he was required to consult about this restructuring proposal. He prepared a document about the restructuring for consultation purposes on 24 May 2004. The proposal in essence was said to create two new and substantially different roles of office administrator and office junior, to perform functions at a lesser level than currently, who would report to the administration manager at Allied Petroleum in Christchurch. The document stated that if the proposal was implemented the three existing positions, only two of which were currently filled, would be made redundant and applications would be sought for these two new positions. Current staff would be welcome to apply. Staff were told that if they did not apply, or were unsuccessful, they would be given notice of termination of employment on the grounds of redundancy. A timetable over the next month or so for consultation and implementation of the proposal was set out. Feedback was sought from the staff.

[12] Ms Edmonds and her daughter believed that the proposed positions were essentially the same as the ones they were currently doing and therefore they wanted to retain what they saw as their jobs. They also proposed that the positions be offered to them on the basis of reduced salaries and changed titles.

[13] Mr King was unable to meet with Ms Edmonds until 14 June. She again made it clear that she did not accept that the positions were new. Ms Edmonds suggested that if that were the case, then she could be made redundant and then be offered the lower paid office administrator position. Mr King replied that that would never happen, which is understandable because Allied would then be in the position of paying Ms Edmonds substantial redundancy compensation and rehiring her the next day. Ms Edmonds would also have been offered the position without Allied being able to test the market as to whether there were more suitable persons to take over the office administrator role. Ms Edmonds then put forward her alternative proposal, as set out above, which Mr King said would be considered.

[14] Mr King considered Ms Edmonds' views but decided that the restructuring should continue as planned. He considered that the key issues were that the ongoing roles required in Allied were at a much lower level than before HW Richardson took over Allied, and that only two staff were required and not three. This demonstrates that

for Ms Edmonds' position there would be a substantial diminution in her responsibility and the level of the processing work that she did, particularly as the work of the third staff member would have to be formally covered by the two new positions. Mr King accepted that the high level of pay that Ms Edmonds was receiving, compared with the level of duties that she was currently doing and the even lower level she would be expected to do if she were appointed to the office administrator position, was one of the reasons why he proceeded with the restructuring. In essence Mr King's evidence was that there had been substantial reductions in Ms Edmonds' role, that these were ongoing and that under the new structure there would be an even greater reduction in terms of her responsibilities and the level of skills required of the office administrator.

[15] On 16 June Mr Carnahan announced that the restructuring proposal would be implemented. The positions of office administrator and office junior were advertised internally within the wider HW Richardson group on 16 June. Applications closed on 22 June. Ms Edmonds did not apply for the position on the basis that she felt an application would be an acceptance that the positions were different. She told Mr King so when he spoke to her after applications had closed to try and encourage her to apply, even at that late stage.

[16] Mr King contacted Ms Edmonds again on 28 June asking her to put in a CV so that she could be considered for the new job. Ms Edmonds declined to do so, but did tell him over the phone of her work experience. It was made clear to Ms Edmonds that if she did not apply she would be made redundant. Ms Edmonds understood that, but maintained her view that she should simply be offered the office administrator job. By that point another employee of HW Richardson had expressed an interest in the job and Ms Edmonds was told of that.

[17] Mr King approached Ms Edmonds again at the end of that week asking if she would be prepared to be considered for the new position. At that time Ms Edmonds agreed and an interview was arranged. Ms Edmonds rang back later the same day, however, to state that she did not want to be interviewed as Allied already knew all about her. Mr King pointed out that he had only known Ms Edmonds for three months, but she was adamant that she should simply be appointed to the job and would not be applying for it, because by agreeing to an interview she would be accepting that the positions were new.

[18] The other staff member was an Australian who was dissatisfied with the weather in Invercargill. Mr Carnahan thought that she might be an appropriate person for the office administrator position in Hastings. She was subsequently interviewed by Mr King and was offered the position, which she accepted, subject to going to Hastings with her husband to check out accommodation, and after having negotiated a wage increase to \$45,000 plus the use of a car valued by Allied at \$5,000 per year. This took place after Ms Edmonds had declined to apply for the job. Mr King felt that she was the best person for the job given that Ms Edmonds would not undertake an interview, and that given the lower responsibilities and pay of the position he did not feel that Ms Edmonds would stay with Allied for long.

[19] On 7 July 2004 Ms Edmonds was given notice of redundancy, albeit by that time the Invercargill based employee had not visited the Hawke's Bay. Mr King took this action because he was extremely confident that she would accept the position, as in fact she did, starting work at Allied in Hastings on 27 July, just before Ms Edmonds completed her four week notice period.

[20] In the letter of notice of redundancy Ms Edmonds was informed of the company's offer of redundancy counselling and CV preparation assistance. Ms Edmonds was invited to approach Mr King about that but she did not do so. Before she completed work, however, Mr King did approach Ms Edmonds advising her of the counselling and other assistance available. Unfortunately Ms Edmonds decided not to take advantage of the offers because she felt again that that would be accepting that her position was genuinely redundant.

[21] For completeness I note that no appointment was made to the second new position and an agency had to be utilised for the office junior role for several months. I also note that Ms Edmonds did receive a reference upon formal request. Finally, Ms Edmonds' concerns about information concerning her daughter's employment have not been addressed by me because they are irrelevant to Ms Edmonds' own claims.

[22] Ms Edmonds did little to seek work after her redundancy because, she says, of her depth of feeling of unfairness over what she believed was her position being taken away from her unjustifiably. Despite mediation, the parties have been unable to resolve the employment relationship problem and it falls to the Authority to make a determination accordingly.

The Law

[23] As the events in this case culminated just before 1 December 2004, the law on redundancy is that determined by the Court of Appeal in *Coutts Cars Limited v Baguley* [2001] ERNZ 60. This means that the good faith requirements on employers are basically limited to the common law implied duties of mutual trust and confidence and the extended definition of good faith in the 2004 amendment to the Act does not apply. Similarly, the test to be applied is what a fair and reasonable employer could do in the circumstances, not what a fair and reasonable employer, objectively measured, would do, as is contained in the new section 103A of the Act.

[24] Redundancy is therefore assessed in terms of the test in *GN Hale & Son Limited v Wellington Caretakers etc IUOW* [1990] 2 NZLR 1079. As Cooke P held at 1084:

An employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, reorganisation or other cost-saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have a right to continued employment if the business can be run more efficiently without him.

[25] In *Aoraki Corporation Limited v McGavin* [1998] 1 ERNZ 601, the Court of Appeal found at 618 that:

Where it is decided as a matter of commercial judgement that there are too many employees in a particular area or overall, it is for the employer as a matter of business judgement to decide on a strategy to be adopted in the restructuring exercise and what position or positions should be dispensed with in the implementation of that strategy and whether an employee whose job has disappeared should be offered another position elsewhere in the business.

[26] The Court of Appeal also held, in *New Zealand Fasteners Limited v Thwaites* [2000] 1 ERNZ 739 at 747, that:

In a situation of genuine redundancy, where the position is truly surplus to requirements, in the absence of contractual provision to that effect, it cannot constitute unjustified dismissal not to offer the employee a different position. The relationship between employer and employee applies in respect of the position and work the employee is contracted to provide. That may be varied consensually in the course of the relationship but it does not extend to any other position a Court might subsequently determine would be suitable to the employee. Nor does the obligation to deal fairly with an employee extend beyond the job in which he or she is employed. The obligation is implied into the contract for that employment.

[27] The Court of Appeal also held at 748 that:

While some positions might become surplus to requirements abruptly, as on a restructuring or changing technology, many will diminish over time to a point when it is recognised they should be declared to be redundant. In these latter cases it would be quite unrealistic to regard the position as encompassing only those residual duties remaining at the time inevitable is recognised. To do that would be to penalise employers for retaining employees longer than is necessary. Bearing in mind it is a business decision to be made as a matter of commercial judgement, it must be open to the employer to assess the requirements of the business with respect to positions as established and as envisaged in the structure of the business operation. Here the fact that both the Tribunal and the Judge found a new position to have been established can not be departed from because Mr Thwaites' duties had diminished to resemble those of the new position. That was the very reason for the redundancy. It is not a ground for negating it.

[28] If employees fail to apply for positions in restructuring situations then that responsibility must lie with themselves and not with the employer: *NZPSA v Department of Conservation* [1991] 1 ERNZ 477 and *Rolls v Wellington Gas Co. Limited* [1998] 3 ERNZ 116.

Determination

[29] Ms Edmonds is entirely genuine in her concerns about the way she was made redundant by Allied. From her perspective the major changes to her job had already occurred and her position had been confirmed by Mr Huddleston. In this view she was in many ways correct. The facts of this case are, however, similar to that in *Thwaites*. Ms Edmonds' position was subject to a lowering in responsibility and skill level over an extended period of time and it was clear that this trend would continue in the future. In these particular circumstances I conclude that it was open to Allied to both reduce the support staff from three to two on a permanent basis and to assess that the skill levels required of both positions would be less than the two remaining staff members' positions. In particular, it was clear that Ms Edmonds' responsibilities were significantly less than those in place before the HW Richardson group took over. This is particularly so because of the reduction from three positions to two and the loss of all supervisory functions, which occurred as a result of the restructuring. The compressing of three positions, one senior, one intermediate and one junior into one junior and one other role made it justifiable for Allied to conclude that the new role was substantially different from Ms Edmonds' supervisory role (see for example *Sides v. Special Education Service* [1993] 1 ERNZ 133). In these circumstances Ms Edmonds cannot successfully argue in law that the new position of office administrator was sufficiently

similar to the position she held as administration supervisor so that the essential continuity of the position and thus her employment would be continued.

[30] No doubt in Ms Edmonds' mind matters looked even more unfair when her situation was compared with other staff, who had agreed changes to their position without changes in the level of remuneration in the previous few months. Unfortunately for her the difference here is that Allied and the employees concerned were prepared to reach an agreement on the way the job would be restructured and the level of salary. In this case Allied would not agree with either of Ms Edmonds' suggestions that her role simply continue, or that she be put in a new role at a lower salary, and it was not obliged to do so. I find therefore that the situations with other staff were concluded by agreement and that as a result there was no disparity of treatment between Ms Edmonds and any of the other staff who maintained their employment during the restructuring.

[31] Furthermore, it must have appeared quite unfair to Ms Edmonds that the employee from Invercargill was employed to replace her at a salary between that advertised and her own. Unfortunately Ms Edmonds must take some responsibility for this because of her refusal to apply for the office administrator position and the impact the refusal, in particular to be interviewed, had on her potential for being employed to that position, which I accept she was considered for.

[32] Thus again while it might seem unfair to Ms Edmonds, the responsibility for the other worker being appointed over her lay as much with her as for any other reason.

[33] I accept that Allied implemented the redundancy fairly. There was a proposal put in writing to Ms Edmonds. She was given the opportunity to respond and a consultative meeting was held. She was offered the opportunity to apply for the new position but declined to do so and she must take responsibility for this. Similarly, I find that she was given appropriate opportunities to take up counselling and CV assistance, but again for her own reasons declined to do so.

[34] Much of what I have highlighted as errors on Ms Edmonds' part were not done so consciously. She would have greatly benefitted from independent advice, which may well have meant that she would have applied for the positions without prejudice to her right to pursue a claim that the positions were effectively the same, and equally, to have accepted the counselling offered on the same basis. I am quite sure that had

matters been dealt with in this way a great deal of the anger and distress Ms Edmonds has suffered as a result of this process could have been obviated.

[35] It follows from my conclusions above that Ms Edmonds' claims must be dismissed.

[36] I note finally that even if I had found in Ms Edmonds' favour any claim for wages would have minimal because of her failure to mitigate her losses by actively seeking employment and then it would have been set off against her redundancy compensation.

Costs

[37] Costs are reserved.

G J Wood
Member of the Employment Relations Authority