

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 139/10
5164314

BETWEEN

PAMELA GALBRAITH
Applicant

A N D

GIRL GUIDES
ASSOCIATION OF NEW
ZEALAND INCORPORATED
Respondent

Member of Authority: James Crichton

Representatives: Jeff Goldstein, Counsel for Applicant
Peter Macdonald, Advocate for Respondent

Investigation Meeting: 27 April 2010 at Christchurch

Determination: 30 June 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Galbraith) alleges that she was unjustifiably dismissed on 15 May 2009 and that the employer breached its obligations of good faith towards her. The respondent (Girl Guides) denies all of Ms Galbraith's allegations, contending that the dismissal for redundancy was genuine and dealt with in a procedurally fair manner.

[2] Ms Galbraith had had a long involvement with Girl Guides dating back 30 years. Her original work as a volunteer was replaced eventually by paid employment such that for the period from 1996 through to 2007, Ms Galbraith was Youth Services Manager at Girl Guides. In 2007, she was appointed Programme Manager and it was from that position that she was dismissed for redundancy on 15 May 2009.

[3] Ms Galbraith had had a long period of annual leave visiting her children overseas and returned to duty on 4 May 2009. On that day, Ms Galbraith was given a

letter indicating a restructure was under way and that her position might be affected. There was a meeting on 11 May 2009 which culminated in Ms Galbraith receiving another letter from Girl Guides dated the same day which confirmed that if the restructuring proposal proceeded, her position would be disestablished.

[4] There was a final meeting between the parties on 15 May 2009 at which Ms Galbraith made her responses to Girl Guides. There was a brief adjournment in the meeting and, when the meeting reconvened, Girl Guides indicated that Ms Galbraith's position had been disestablished and that her work would finish immediately.

Issues

[5] The only question for the Authority to determine in the present case is whether Ms Galbraith has been unjustifiably dismissed or not. To assist evaluating that central theme, I propose to look at the following questions:

- (a) What information was provided to Ms Galbraith by Girl Guides?
- (b) Was there genuine consultation?

What information was provided to Ms Galbraith by Girl Guides?

[6] There is dispute between the parties about what Ms Galbraith would have known about the financial position of Girl Guides prior to her return from annual leave on 4 May 2009. Ms Galbraith told me in her oral evidence that she knew that the organisation *had economic stress* but only from her own *commonsense*. Critically, she also told me in the same exchange that she had no reason to think that redundancy would follow, particularly as there had been a restructuring 18 months earlier. So from Ms Galbraith's perspective, when she returned to duty on 4 May 2009, she had no understanding that the organisation she worked for was in peril or indeed that her job was in jeopardy and she maintained that there was no reasonable basis on which Girl Guides could think that she knew more than she actually did.

[7] I am satisfied that, as a matter of fact, Ms Galbraith's understanding of the position is demonstrably accurate. Girl Guides was unable to identify any evidence to suggest that Ms Galbraith had information about the restructuring until the meeting between her and Girl Guides' Chief Executive on 4 May 2009. Even at that meeting,

Girl Guides' Chief Executive (Ms Teasdale) acknowledges that Ms Galbraith knew nothing about the restructure. Ms Teasdale's own notes of that meeting describe her saying to Ms Galbraith ... *we have been considering ways of reorganising*. She then goes on to record that Ms Galbraith was *taken aback by this and said that she was unaware that we had been reviewing how we do things. I said that this was probably because she had just returned from two months' leave and that we had been waiting for her return to talk about it with her*.

[8] Clearly then, Ms Galbraith knew nothing about the proposed restructure until 4 May 2009. Ms Galbraith contends that Girl Guides had obviously been working on the restructure for some time and that it should have been possible for her to be advised before she went on annual leave. However, she was, by common consent, away for two months, and I think it unlikely on the evidence before the Authority that Girl Guides would have been in a position to advise Ms Galbraith before her departure and therefore the practical reality was that the only option was to confront Ms Galbraith with the proposed restructure on her return from annual leave.

[9] It is clear, then, that the first occasion on which Ms Galbraith would have received any information concerning the restructure was at the meeting of 4 May 2009. Based on Ms Teasdale's notes of that meeting, it would appear that the only significant piece of information imparted to Ms Galbraith about the nature of the proposal was that Ms Galbraith was not the only affected staff member. There is nothing in the notes that suggests that there was any other significant information provided about the actual proposal; most of the conversation appears to have been around the process by which the consultation would be undertaken and in particular, whether Ms Galbraith could find a support person in time for the meeting. The letter presented to Ms Galbraith at that meeting and dated the same day is also not a detailed explanation of what is proposed, but simply indicates that a proposal has been developed to restructure the part of the organisation which included Ms Galbraith's position. In particular, I note that there is no report or other document which analyses the proposal and explains it in any way.

[10] This is so despite Ms Teasdale's evidence to the Authority which was to the effect that since her appointment in early 2009, she had been working extensively on what she herself describes as *two significant issues that ... needed [my] immediate attention*. The first of those was identified as the organisation's vulnerability to the

economic recession and the second was *a number of organisational issues that had not been effectively managed over time*. One has to have some sympathy for Ms Teasdale who, having just been appointed to the position of Chief Executive, was effectively confronted with two reasonably significant challenges which required immediately to be addressed. But of course what the Authority must judge is whether Ms Teasdale has fulfilled her obligations to Ms Galbraith in providing Ms Galbraith with proper, fulsome information about the proposal to restructure such that Ms Galbraith is able to genuinely involve herself in consultation with the employer to, amongst other things, seek an alternative outcome to the loss of the position.

[11] It is difficult not to conclude that the information provided to Ms Galbraith on 4 May 2009 was plainly insufficient to enable her to have any sense of the nature and extent of the proposal. When the parties met on 11 May 2009, Ms Galbraith's evidence is that Ms Teasdale *explained the proposal* and it is common ground that Ms Teasdale gave Ms Galbraith her letter dated 11 May 2009 which provided more information about the nature of the proposal. What the letter says is that Girl Guides wants to *deliver membership services in the most efficient and effective way possible* and in that context, the proposal is that the role of Programme Manager (Ms Galbraith's position) be disestablished. Part of her work was to be contracted out and part of it was to be absorbed by remaining staff members. With the exception of further detail about the ongoing consultation process, the letter makes no other pertinent observations about the nature of the proposal. In particular, it nowhere discloses that the impetus for the change is a serious financial situation, although plainly that is the reason. Nor does it put into context the proposed disestablishment of this position with in the wider structure of the whole organisation. Even in her oral evidence before the Authority, Ms Teasdale made clear that the proposal was, in her terms, *very simple*, either to disestablish Ms Galbraith's role and contract it out, or not. The problem with this simplistic approach is that it fails to put this particular part of the restructure into context, fails to identify motive and makes it very difficult for an affected staff member to adequately respond to the proposal.

[12] Ms Galbraith made precisely that point in her observations to the next meeting between herself and Girl Guides which took place on 15 May 2009. At that meeting, Ms Galbraith addressed Girl Guides from a set of bullet points she prepared and dated the same day. The first bullet point reads in part *I believe that an employer is obliged to explain the business rationale and provide sufficient information for an employee*

to provide input into the proposal. I think that observation is not only a fair criticism of Girl Guides' information sharing, but also, as I noted above, an accurate statement of Girl Guides' legal obligations.

[13] Further down her list, Ms Galbraith advances this proposition:

I assume from comments regarding the current economic climate that "efficient and effective" equates to reducing expenditure but no detail is provided as to how my redundancy will achieve that objective; ... there is no evidence of an objective selection process or criteria to determine who were made redundant.

[14] Again, those observations are both pertinent and, in the Authority's opinion, fair and valid criticisms of the process adopted by Girl Guides. Again, it is fair to note that the very point Ms Galbraith makes is also in accord with the legal position where an affected employee is entitled to be told how the demise of their position will affect the overall viability of the organisation and achieve whatever the employer's objectives are in terms of the redundancy. Here, because of the paucity of information, it is impossible to judge what the effect of Ms Galbraith's position disappearing would be, how that would positively influence the organisation in the future, and what might reasonably have been suggested by way of alternatives to genuinely impact, or potentially impact, on the employer's deliberations.

Was there genuine consultation?

[15] Having just established that the information supplied by Girl Guides to Ms Galbraith was insufficient to fairly and reasonably advise her of the employer's proposal and in particular having identified the failure of the employer to give any contextual information so as to genuinely facilitate engagement by Ms Galbraith, it has to be said that the possibility of viable consultation in the absence of an acceptable package of information must be slim indeed. That in fact is the position; the absence of adequate information made consultation difficult but there were other factors as well which impacted on an unsatisfactory consultative process.

[16] First, there is the general question of whether the process adopted by Girl Guides provided adequate potential consultation. I hold that it did not. Effectively, the first contact between the parties on 4 May 2009 did no more than identify to Ms Galbraith that there was a restructuring proposal in the wings. It is clear on my earlier analysis that that meeting provided no part of the consultative engagement

which the law requires. The next meeting does not seem to be a great deal better. There is a tad more information provided, and that is evident from the 11 May letter, but even on the second meeting, Ms Galbraith's evidence is that the employer was simply *going through the motions*. Even if that observation is not a fair assessment of the process, it is reasonable to conclude that if there was an extensive engagement between the parties, the evidence from Girl Guides would have made that clear and it does not. The notes of that meeting are available but do not positively demonstrate that extensive engagement.

[17] That really leaves us with the final meeting, the one held on 15 May 2009, at which Ms Galbraith was supposed to advance her alternative views to those set out in the restructure proposal. As I have already made clear, I am satisfied that the information provided by Girl Guides was so fatally flawed as to preclude Ms Galbraith from making any viable observations about an alternative strategy, even if there were not other problems.

[18] But, as the parties' evidence discloses, there were other issues as well on the 15 May meeting. Ms Teasdale, for Girl Guides, says that Ms Galbraith's support person effectively made a nuisance of himself. Ms Teasdale says that the support person continually interrupted and made various accusations, including threatening a personal grievance unless *I did a deal*. That support person was Stewart Rose, a commercial barrister and mediator who attended the meeting with Ms Galbraith as a friend. He gave evidence to my investigation meeting and struck me as level headed and sensible. He denied what he referred to in his oral evidence as the *bad behaviour* attributed to him by Ms Teasdale and was equally damning about the process which she adopted in the 15 May meeting. He said that Ms Teasdale's 15 May meeting was "predetermined" and that meeting was "chilly and perfunctory". I asked Ms Galbraith about Mr Rose's behaviour at the end of the investigation meeting, and she also denied that he had *behaved badly*. She said that Mr Rose was assertive but no more than that. Mr Rose had told me that the notes of the meeting of 15 May were not strictly accurate, but even setting that comment aside, the notes, as they are, do not disclose a meeting that had been hijacked by a support person (as Girl Guides claims).

[19] I know how stressful these sorts of meetings are for all participants (including employers), and I feel certain that this meeting will have been no different from other similar meetings in similar circumstances. However, in the present circumstance, I

must decide whether Mr Rose hijacked the process (as Girl Guides contends), or whether the meeting was simply a robust exchange between parties caught up in an unpleasant factual situation. If I am persuaded that the meeting was hijacked by Mr Rose, then Girl Guides' argument may have some force that its whole consultative process was disestablished by Mr Rose being difficult. Conversely, if I am not persuaded as to that, then Girl Guides' process is further subject to criticism.

[20] I confess I can find no basis for concluding that Mr Rose behaved badly. Apart from the obvious point that as a legal practitioner in good standing with all the professional obligations that that entails, the evidence before the Authority simply does not support Ms Teasdale's claim. Neither Mr Rose nor Ms Galbraith thought Mr Rose did anything other than be assertive, and there was absolutely no reference to Mr Rose's alleged bad behaviour until Ms Teasdale's brief for the investigation meeting was filed. The Girl Guides' minutes of the 15 May meeting do not suggest Mr Rose hijacked the meeting, and the matters that he is alleged to have raised on Ms Galbraith's behalf seem to me to be the sorts of matters that one would expect a support person to raise in an interview such as this.

[21] One final matter that needs to be dealt with for the sake of completeness is the curious reference in the remarks attributed to Mr Rose to Ms Galbraith having been promised *a job for life*. This reference appears twice in the minutes of the 15 May meeting and Mr Rose's evidence is that he said what he said because Ms Galbraith had told him about promises that had been previously made to her. For her part, Ms Galbraith said in her evidence that she had been given an assurance at the time of the previous restructure some 18 months before that her new position was secure and she had relied on that rather than seek alternative positions with other employers. She resiled from the suggestion that she had been promised the job for life but did depose that she had been given assurances.

Determination

[22] I am satisfied on the evidence before the Authority that the information provided by Girl Guides to Ms Galbraith was manifestly insufficient for the reasons I have outlined in this determination and that, as a consequence, there really was no prospect of viable consultation between the parties because the paucity of information provided by the employer did not allow the employee to actively engage in consultation with the employer.

[23] Furthermore, I am satisfied that the consultation process itself, looked at in isolation from the provision of the necessary information, is also fatally flawed in that it was simply inadequate to meet the legal obligations that Girl Guides had to Ms Galbraith in terms of s.4(1A)(c) in particular of the Employment Relations Act 2000.

[24] Applying the test set out in s.103A of the Employment Relations Act 2000, I am satisfied that Ms Galbraith has proved her claim that she has been unjustifiably dismissed by Girl Guides. In reaching this conclusion, I have derived guidance from the decision of the Chief Judge in *Simpsons Farms Ltd v. Aberhart* [2006] ERNZ 497 where the Court held:

A fair and reasonable employer must, if challenged, be able to establish that he or she or it has complied with the statutory obligations of good faith dealing in s.4 including as to consultation because a fair and reasonable employer will comply with the law.

[25] This then, in the present case, is an employer who I hold has not complied with s.4 and so this is not an employer which has met the statutory obligation. Objectively judged, a fair and reasonable employer would not have managed a redundancy process in the way that Girl Guides did.

[26] There is no question in the Authority's mind that this employer has failed to meet its obligations in terms of process. Ms Galbraith's able counsel urges on me the proposition that, as well as being poorly managed, the redundancy is also not genuine. In particular, I am encouraged to view the failure to explore redeployment created in an environment where the wages lost by Ms Galbraith as a consequence of the termination of the employment were a consequence of the personal grievance rather than the redundancy itself.

[27] I accept that submission, but not for the reasons advanced by Ms Galbraith's counsel. Ms Galbraith's counsel relies particularly on the employer's failure to engage on redeployment. It is true that that is precisely what happened, but I prefer to base my decision on the fact that the evidence clearly shows that Girl Guides brought an already short consultation process to an early conclusion having failed to get any real engagement with Ms Galbraith. I am satisfied that if the process had been of sufficient duration and had contained the appropriate elements, including adequate consultation over adequate supplies of information, then the parties would have been able to explore what other ways each could facilitate the other's aims.

[28] I am satisfied then that it is appropriate for the Authority to consider both compensation claims and lost wages claims in the present environment. Before considering that, I look at the question of contribution and I conclude that Ms Galbraith has made no contribution whatever to the circumstances giving rise to her grievance.

[29] In order to remedy her grievance, I direct that Girl Guides is to pay to Ms Galbraith the sum of \$16,000 as compensation under s.123(1)(c)(i) of the Employment Relations Act 2000, and in addition, to pay to Ms Galbraith the sum of \$17,500 gross as a contribution to her lost wages.

Costs

[30] Costs are reserved.

James Crichton
Member of the Employment Relations Authority