

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 246/10
5285363

BETWEEN TONI JAY GARDNER
 Applicant

AND RADIOWORKS LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: M Rollo, advocate for applicant
 C Bradley, advocate for respondent

Investigation Meeting: 19 April 2010 at Tauranga

Determination: 24 May 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Toni Gardner says her former employer, Radioworks Limited (Radioworks) dismissed her unjustifiably on the ground of redundancy. She says the redundancy was not genuine in that a new position offered to an outside applicant was her redundant position. She also says that she was not adequately consulted in that an alleged higher level of seniority associated with the new position was not raised during the consultation process.

[2] Radioworks says the redundancy was genuine and the position was a new one. It says further that Ms Gardner did could and did appreciate the higher level associated with the new position. Overall it says that it followed a fair procedure in implementing the redundancy and the dismissal was justified.

Background

[3] Radioworks employed Ms Gardner as a sales consultant, commencing in April 2008. In common with most company employees Ms Gardner was engaged under a

set of standard terms of employment, as well as additional terms contained in a 'statement of personal terms'. Ms Gardner's statement of personal terms contained a list of duties, amounting to selling radio advertising on Radioworks radio stations in the Tauranga area as well as activities ancillary to the sales duties. The remuneration provision set out a 'guaranteed commission payment' of \$45,000 per annum to 30 June 2008, after which Ms Gardner moved to a base salary of \$45,000 per annum plus commission according to the scale usually applicable to sales consultants.

[4] Each sales consultant's position, including Ms Gardner's, was further defined informally with reference to the consultant's client list. Consultants were given their own list of clients to service, to the exclusion of other consultants. Ms Gardner's list comprised clients formerly on the list of a person who had left, as well as a miscellany of other clients some of whom had been inactive for a significant period. At the time her position was a new and junior one.

[5] In February 2009 Kate Rigg, the sales manager in Tauranga, prepared a restructuring plan in response to a company directive to reduce costs and increase efficiency in all markets. She analysed the client lists and proposed reducing the existing 8 sales consultant's positions to 7, with one new sales assistant's position.

[6] The reduction from 8 positions to 7 was to be achieved by merging Ms Gardner's list with that of a second junior and relatively newly-appointed sales consultant. The remaining lists would be unchanged. The merger of the two lists would create a new sales consultant's position in that more inactive clients would be dropped, and the list would include a greater number of higher-spending clients. Ms Rigg said in evidence that she turned her mind specifically to the junior nature of the two positions whose lists were to be merged, and concluded that better synergies would be created with a structure of 7 relatively senior sales consultants' positions supported in part by the sales assistant's position.

[7] A document containing the restructuring proposal was prepared and put to Ms Gardner and the second junior sales consultant on 20 February 2009. The proposal explained the new structure and detailed the two new positions. In particular it referred to two sales lists as 'underperforming' and said that the proposal was "to disestablish the two underperforming sales lists and merge them into one." Ms Gardner took the

word 'underperforming' personally but it was intended as a reference to the quality of the client lists and the revenue they generated, and there was no suggestion that Ms Gardner's performance as a junior sales consultant was other than appropriate to her level of experience.

[8] The restructuring proposal set out a proposed timetable for consultation and implementation of the restructuring, and for subsequent interviews for the new positions. It said applications for the new positions would be sought both internally and externally. If the affected employees were not appointed to the new positions, or decided not to apply for them, their employment would be terminated on the ground of redundancy.

[9] The affected employees indicated only that they wished to remain in employment. Accordingly the proposal was confirmed in a document dated 3 March 2009. The employees were invited to apply for the new positions.

[10] Although she acknowledged that it was being created from a merger of two client lists and would be more demanding, Ms Gardner perceived the new sales consultant's position to be the same as her existing position. She and the other consultant affected arranged that she would apply for the sales consultant's position and the other consultant would apply for the new sales assistant's position.

[11] Ms Rigg did not consider the new consultant's position was the same as either of the original two positions. The merger transformed the two relatively less substantial client lists into a single more substantial list. In turn greater responsibility and autonomy and a higher level of sales skills would be required. Further, the commission structure was such that a list containing a relatively larger number of active or higher-spending clients would generate more income for the consultant concerned. Although the point was not spelled out to Ms Gardner prior to the interviews, Ms Rigg believed that Ms Gardner understood enough about the client lists to appreciate the implications.

[12] Ms Gardner duly applied and was interviewed for the sales consultant's position. The vacancy was notified as an 'account manager' position, as an indication that the position was relatively senior. I accept Ms Rigg's evidence that

during the first interview on 9 March she gave Ms Gardner a fuller explanation of the increased responsibility the position attracted. The interview questions were directed at ascertaining Ms Gardner's ability to handle such a position.

[13] After the initial interviews the applicants were reduced to a shortlist of three. Ms Gardner was one of the three. Both of the others were former employees with significant radio sales experience.

[14] Ms Gardner was interviewed for a second time on 13 March, and advised there was a shortlist. She was asked to detail her strategy for dealing with the new client list, with Ms Rigg and the other interviewer concluding that she did not respond as well as the candidate who was ultimately successful. In particular the successful candidate had impressed with her planning and analysis of the position's requirements, and her discussion of ideas for opportunities to grow revenues.

[15] Ms Gardner was advised of the outcome on 16 March. She said in evidence she was told she was to be replaced, but I accept the outcome was not put to her in that way. Instead Ms Rigg told Ms Gardner that her application was unsuccessful. Ms Rigg also suggested that Ms Gardner apply for another vacancy currently available, but Ms Gardner did not wish to do so.

[16] The next day arrangements were made for the termination of Ms Gardner's employment. Ms Gardner was not required to report for work during the associated one-month notice period.

Determination

[17] The test of the justification for this, and any, dismissal is whether in the circumstances at the time dismissal was an action an employer acting fairly and reasonably would have taken. In redundancy situations a fair and reasonable employer must, if challenged, be able to establish that he or she has complied with the statutory obligations of good faith dealing in s 4 of the Employment Relations Act 2000, including as to consultation because a fair and reasonable employer will comply with the law."¹

¹ **Simpson's Farms Limited v Aberhart** [2006] ERNZ 825, 842

1. Whether the 'old' and 'new' positions were the same position

[18] Mr Rollo submitted that the 'reshuffling' of customers did not make the position a different one. Such a proposition may be true without more, but each case turns on its own facts.

[19] Here I understood Ms Gardner to accept that, in effect, the merged client list was more significant in terms of active clients and client spending levels than her original list. She said she understood the list would be 'bigger', but not that a more senior person would be required for the position. She believed she could do the job 'as well'.

[20] Because in practice the sales consultants' work was defined as much by the client lists they serviced as by the standard definition of their duties, and because the merged list associated with the position for which Ms Gardner applied was a more substantial list for the reasons indicated, I find Radioworks was justified in considering the merged list rendered the position more senior than Ms Gardner's. It was no longer a junior, or 'rats and mice' position. In that sense it was a new position, essentially different from Ms Gardner's position.

[21] The question of whether Ms Gardner would have been capable of carrying out the duties of the new position is a different question from whether her position and the new position were the same. The former was addressed to the extent that, in the course of a recruitment process which has not otherwise been challenged, Radioworks concluded that another applicant was the best applicant. The latter is in issue here, and is answered by the finding set out above.

[22] For these reasons I find the redundancy was genuine.

2. Whether the consultation process was fair

[23] During the investigation meeting an issue arose of whether, during the consultation process, Ms Gardner was adequately advised of the difference between her existing position and the proposed new position.

[24] At the time, Radioworks believed that Ms Gardner appreciated that the position was more senior. For her part Ms Gardner understood that the position would be more demanding, but did not take the next step and see it as a different position. However the fact that the position was to be open to outside applicants, and the procedure advised to Ms Gardner included the process to be followed if she were not appointed to the position, should have alerted her that the position was being viewed as a different and more senior one. She had an opportunity to query or challenge these matters during the consultation process, but did not take it.

[25] Accordingly although the proposal document could have spelled out that the positions associated with the original lists were 'junior' positions rather than referring to underperforming lists, and could have spelled out that the position being advertised was a new and more senior position, I do not consider this a flaw vitiating the dismissal.

3. Conclusion

[26] For these reasons I conclude that the redundancy was genuine and the dismissal was justified.

Costs

[27] Costs are reserved.

[28] The parties are invited to agree on the matter. If they seek a determination from the Authority any party seeking an order shall have 28 days from the date of this determination in which to file and serve a memorandum setting out what is sought and why. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority