

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 382/10  
5278362

BETWEEN                      NINA GRIFFITH  
   Applicant  
  
AND                                WISET LIMITED  
   Respondent

Member of Authority:      R A Monaghan  
  
Representatives:            N Griffith in person  
   No appearance for respondent  
  
Investigation meeting:     16 August 2010  
  
Determination:              24 August 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]      Nina Griffith says her former employer, Wiset Limited (Wiset) dismissed her unjustifiably on the ground of redundancy. She has also raised a number of grievances on the ground that her employment was affected to her disadvantage by the employer's unjustifiable actions in: unilaterally altering her working conditions; favouring others in a restructuring; isolating and bullying her by excluding her from conversations conducted in a language other than English; and not providing a safe and secure workplace by failing to prevent her isolation and bullying.

[2]      Wiset says the dismissal on the ground of redundancy was justified on financial grounds, and denies it has acted unjustifiably to disadvantage Ms Griffith in her employment.

**Preliminary matter**

[3]      Wiset did not appear and was not represented at the investigation meeting. It had received the statement of problem, filed a statement in reply, and participated in

the conference call which the Authority conducted in order to discuss arrangements for the investigation. Subsequently it received the notice of investigation meeting.

[4] A timetable for the filing of witness statements was discussed during the call and confirmed in writing to the parties. When Wiset did not meet the timetable an Authority support officer contacted it several times to enquire about the matter. By emailed message dated 5 August 2010 a director and shareholder, Richard Scott, repeated that the company was facing financial difficulty and advised further that for financial reasons there would be no attendance at the investigation meeting. He was advised of the likely consequences.

[5] Accordingly I proceed under clause 12, Second Schedule of the Employment Relations Act 2000 to act as fully in the matter as if Wiset had attended or been represented at the meeting.

### **Background**

[6] Wiset held a franchise and operated a café known as the Mecca Northcote. From March 2008 it employed Ms Griffith as an assistant chef at the café. According to the parties' employment agreement Ms Griffith was to work for 25 hours per week, on a roster operating from Monday – Sunday inclusive and from 6 am to 6 pm. Ms Griffith says her hours increased to 40 per week when a staff member left towards the end of 2008. Thereafter she worked from 6 am to 2 pm on Monday - Friday.

[7] On Monday 18 May 2009 Ms Griffith received a text message from Yum Scott (the wife of Richard Scott and also a director and shareholder in Wiset) saying: *'Hi Nina I have chang the roster. From 2moro your new time for start is 8 – 3. If you have anything to ask me about roster pls ring me at home ...'*

[8] Ms Griffith telephoned Mrs Scott to ask if she could start at 7 am rather than 8 am, because of concerns about travel and traffic at the later time. She was prepared to accept a reduction in her daily hours from 8 to 7, and accepted that the reduction was being sought because the business was not doing well, but was not willing to agree to the later start and finish time. Ms Griffith believed Mrs Scott was unwilling to listen to her reasons for not wishing to start later. Mrs Scott told her that if she was

not happy she could find a job somewhere else. Ms Griffith told Mrs Scott 'you can't do that', and became upset. Mrs Scott said she would speak to Mr Scott and ask him to write a redundancy letter.

[9] On 19 May Ms Griffith reported for work at 8 am. Mrs Scott handed her a letter of that date giving two weeks' notice of the termination of her employment. The letter went on to say:

*"I am truly sorry that Mecca Northcote is unable to continue to employ you at this point in time. Unfortunately the turnover for the café has not improved to anywhere near last year's levels, making the cost of current staffing levels too high.*

*We did expect turnover to have improved as we progressed into winter, however this hasn't happened as we had hoped. We have also tried to reduce staff hours, so that no redundancies would be necessary, but this has not proved to be enough. Leaving us with no alternative but to make staffing cuts, to try and correct the café's loss making.*

*You have been a loyal, reliable and diligent employee and I really am sad that we have to let you go. ..."*

[10] Ms Griffith was very upset by this information. She completed her day's work, then went to her doctor.

[11] Ms Griffith also approached a person at Mecca's head office for assistance. On Friday 22 May she met with the person. He told her that Mrs Scott had done nothing wrong, but that he would see if there was a job at another Mecca café. He also offered to pay Ms Griffith for the remaining week of her employment in lieu of notice, provided no further action was taken. Ms Griffith found that intimidating and chose not to follow up on the possibility of further employment at a Mecca café.

[12] Ms Griffith did not report for work the following week because she was ill. She said she did not receive any payment for that week as she had no outstanding sick leave entitlement.

### **Whether the dismissal was justified**

[13] 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.’”<sup>1</sup>

[14] I note that in a letter dated 16 June 2009, responding to Ms Griffiths’ raising of her grievance, Mr Scott said Wiset had sought to assess its obligations in regard to redundancies several days before Ms Griffiths’ dismissal. He said he was told Wiset would not be in breach of any laws by imposing a redundancy because of the company’s financial circumstances, provided a genuine attempt had been made to avoid the necessity for redundancies.

[15] If that is an accurate account of the advice Wiset was given then it is incomplete because, in essence, the account addresses only matters arising out of the genuineness of a redundancy. It does not address the procedure to be followed with individuals when redundancies are being considered, nor the obligation to consult employees affected. Further it does not take proper account of the employer’s obligation to act in good faith towards those employees.

[16] For present purposes I accept that the business at Mecca Northcote was in financial difficulty, and that for genuine reasons consideration was being given to the possibility of redundancies. For present purposes I also accept that the possibility of reducing hours of work was to be addressed before any decision to implement redundancies was made, and that was the purpose of the text message Mrs Scott sent to Ms Griffith on 19 May.

[17] Even so, if Ms Griffith’s redundancy for business reasons was likely to follow any inability by the parties to agree on a reduction in her hours, Ms Griffith should have been warned of the prospect. In that respect the sending of a text message merely advising of a change in hours was premature and inadequate. The defect could have been cured in the conversation that followed receipt of the text, but was not. The conversation should have addressed why Wiset’s financial circumstances necessitated a reduction in Ms Griffith’s hours and the reason for the hours being

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<sup>1</sup> **Simpson’s Farms Limited v Aberhart** [2006] ERNZ 825, 842

offered. It should also have addressed why redundancy was possible if agreement could not be reached. Ms Griffith should have been given an opportunity to respond.

[18] Ms Griffith must take some responsibility for her conduct during the conversation. However if the employer's concern was to achieve agreement on a reduction in Ms Griffith's hours as an alternative to redundancy, it should not have been diverted by the argument about start time. If the argument was interpreted as a refusal by Ms Griffith to reduce her hours, then on Ms Griffith's evidence that was not her intention. Further, the mere fact of the argument did not mean Ms Griffith refused to reduce her hours, or that making her redundant was the next and justified step.

[19] If Wiset could not agree to the start time Ms Griffith was proposing, it should have explained why. If the parties remained unable to resolve the matter of Ms Griffiths' hours of work, it would have been better to adjourn the conversation and resume discussions about the prospect of redundancy once Ms Griffith had taken an opportunity to consider her position. In that regard I have not been given any reason why it was necessary to notify the redundancy immediately, and without for example giving Ms Griffith an opportunity to consider her response in the light of the information she should have been given.

[20] For these reasons I find the dismissal unjustified.

### **The disadvantage grievances**

[21] Ms Griffith said her primary concern was with her unjustified dismissal on the ground of redundancy. In addition, most of the matters raised as disadvantage grievances are subsumed in the findings above and I do not take them any further.

[22] The remainder of the concerns arise out of the employment of a Thai-speaking kitchen hand some two months before the termination of Ms Griffiths' employment. Mrs Scott is also Thai, and would hold conversations with the kitchen hand in their native language. Ms Griffiths felt excluded. She has very sensibly chosen not to pursue this claim, and to focus on the dismissal grievance.

[23] For these reasons I find there are no disadvantage grievances.

**Remedies**

[24] Ms Griffith sought compensation in the sum of \$5,000.

[25] Since I have accepted for present purposes that Wiset was facing genuine business difficulties, I accept in turn that Ms Griffiths' redundancy was genuine. Her personal grievance arises out of Wiset's failure to meet its obligations regarding the implementation of the redundancy.

[26] I also accept that Ms Griffith suffered injury to her feelings as a result. Wiset is therefore ordered to pay Ms Griffith the sum of \$5,000 under s 123(1)(c)(i) of the Employment Relations Act 2000.

**Costs**

[27] Ms Griffith is entitled to the reimbursement of her filing fee of \$70. I order accordingly.

R A Monaghan

Member of the Employment Relations Authority