IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 503/10
5297549

	BETWEEN	DONICE HALL-MORRIS Applicant
	AND	WATSON WELLS LTD Respondent

Member of Authority:	Eleanor Robinson
Representatives:	David Grindle, Counsel for Applicant Andrew Golightly, Counsel for Respondent
Investigation Meeting:	2 November 2010 at Whangarei
Submissions received:	11 October 2010 from Applicant 19 October 2010 from Respondent
Determination:	06 December 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mrs Donice Hall-Morris, claims that she was unjustifiably dismissed by the respondent, Watson Wells Limited ("WWL"). Specifically, Mrs Hall-Morris claims that her dismissal on the grounds of redundancy was not a genuine redundancy.

[2] Mrs Hall-Morris claims that she was unjustifiably disadvantaged in her employment through the non-provision by WWL of an individual employment agreement; specifically that she had no knowledge of grievance procedures or of her entitlements in the event of redundancy.

[3] WWL denies that it unjustifiably dismissed Mrs Hall-Morris, and says that the termination of Mrs Hall-Morris's employment was the outcome of a genuine company

restructuring, as a result of which her position was surplus to requirements, resulting in redundancy.

[4] WWL denies that Mrs Hall-Morris was disadvantaged in any way during her employment.

Issues

[5] The following issues require determination:

a. Whether the position of Mrs Hall-Morris was genuinely redundant

b. Whether WWL followed a fair procedure in making Mrs Hall-Morris redundant

c. Whether the failure to provide Mrs Hall-Morris with an employment agreement constituted a disadvantage in employment to Mrs Hall-Morris

Background Facts

[6] Mrs Hall-Morris commenced employment with WWL on 5 May 2008 as an experienced Senior Accountant. Mrs Hall-Morris prepared a job description shortly after commencement, which described her position as Client Services Manager, and which was signed by Mr Craig Wells, sole director and shareholder of WWL. Mrs Hall-Morris explained, and Mr Wells agreed, that this job description was prepared primarily in support of Mrs Hall-Morris's application for membership to the New Zealand Institute of Chartered Accountants ("NZICA").

[7] Following the commencement of her employment, Mrs Hall-Morris claimed that she had repeatedly requested an employment agreement from WWL Having a background and experience in Human Resources, Mrs Hall-Morris had offered to draft an employment agreement, but Mr Wells in response had said he would forward an electronic draft of the WWL employment agreement to her. However Mrs Hall-

Morris said that she did not receive the proposed draft, and eventually she ceased requesting it.

[8] Mr Wells explained that the failure to provide Mrs Hall-Morris with an employment agreement was as a result of an oversight on his part. Mr Wells explained that he had been advised by the IT systems consultants for WWL that all staff should have an internet usage clause in their employment agreements, the wording of which would be supplied by the IT systems consultants. However Mr Wells did not receive the clause wording, he had not pursued the matter and had forgotten Mrs Hall-Morris's request for an employment agreement..

[9] At the commencement of her employment Mrs Hall-Morris was primarily responsible for the undertaking of special non-compliance project work, which she was competent to undertake given her background and experience. This project work consisted of dealing with the sale and purchase of businesses, mergers, and the departure of business partners from businesses.

[10] During the latter part of 2008 and early part of 2009, the special non-compliance project work had diminished, primarily as a result of the global recession. As a result, Mrs Hall-Morris was given work assisting in the practice management aspect of the business, and undertaking some compliance work.

[11] On Thursday 9 July 2009 there was a meeting with a client in relation to whose business affairs Mrs Hall-Morris had been undertaking compliance work. Present at this meeting were the client and his partner, Mrs Hall-Morris, Mr Craig Wells, and Mr Peter Monahan, retired Bank Manager and part-time employee at WWL.

[12] During the meeting there was a request made by the client in relation to the drafting of financial statements in support of a financial proposal to a bank. This request was acceptable to Mr Wells and Mr Monahan but was of concern to Mrs Hall-Morris. Mrs Hall-Morris considered that what she was being requested to do was unethical. Mrs Hall-Morris left the meeting before it had finished to attend a pre-arranged appointment, in what she described as a state of some distress.

[13] Mrs Hall-Morris said she was still upset the following day so she had visited the office just briefly and then signed off as sick. During this day Mrs Hall-Morris telephoned a lawyer in Rotorua, and also contacted the NZICA, to ask for advice.

[14] On her return to the office on Monday 13 July 2009, Mrs Hall-Morris saw Mr Monahan and told him that she was still very upset about the meeting the previous Thursday and believed she was being asked to do something unethical. Mrs Hall-Morris said that she had taken legal and NZICA advice, and as a result she was not prepared to make the requested entries, and that she intended to resign.

[15] Mr Monahan suggested that Mrs Hall-Morris telephone Mr Wells who was absent on annual leave, and discuss the situation with him. Mrs Hall-Morris did telephone Mr Wells but was unable to make contact, and Mr Monahan suggested that she talk to Mr Steve Ganley, an Associate at WWL, in Mr Wells's absence. Mr Monahan offered to brief Mr Ganley on Mrs Hall-Morris's behalf, to which she agreed.

[16] Mr Ganley met with Mrs Hall-Morris and discussed the situation with her. Mr Ganley said that Mrs Hall-Morris was very upset at the start of this meeting, and that as the discussion progressed he realised that she had misunderstood the issues involved and the nature of what she had been requested to do. Mr Ganley said he had explained the transaction and that Mrs Hall-Morris appeared to be reassured by the close of the meeting.

[17] Mr Monahan said that following the meeting Mrs Hall-Morris had worked with him on the bank proposal, and mentioned that she was glad to have been able to have the discussion with Mr Ganley.

[18] Mr Ganley explained that he had still been concerned about Mrs Hall-Morris so he had taken her for a coffee a few days later. Over coffee Mrs Hall-Morris had raised the issue of Mr Monahan behaving in a bullying manner to her and other employees.

[19] Mrs Hall-Morris's comments regarding Mr Monahan bullying herself and other staff was taken seriously and a staff meeting had been held as a result to discuss

the issue, but the complaint had not been substantiated. Mrs Hall-Morris confirmed at the Investigation Meeting that Mr Monahan had wanted the job done rather than bullied her.

[20] When Mr Wells returned to the office towards the latter part of July, he and Mr Ganley met twice with Mrs Hall-Morris. At the first meeting Mrs Hall-Morris offered to resign but her offer was declined, and it was agreed to hold a second meeting the following week.

[21] Mr Wells and Mr Ganley discussed the situation and said they considered that the incident (the meeting on 9 July 2009) had demonstrated that compliance work was not an area of work for which Mrs Hall-Morris had the requisite skill or experience, and as the special project work was unavailable, other options were considered for the utilisation of Mrs Hall-Morris's abilities until such time as more special project work became available.

[22] At the second meeting in July 2009 it was discussed and agreed that Mrs Hall-Morris would be given a trial at the work of reviewing accounting compilation jobs. Mr Ganley would train Mrs Hall-Morris to undertake this work as this was within his area of responsibility. Mrs Hall-Morris commenced the work that month.

[23] As part of the training process, Mr Ganley would review the various jobs after Mrs Hall-Morris had completed them. The review process by Mr Ganley continued after the initial training period. Mrs Hall-Morris said she believed that Mr Ganley was being overly-critical of the work she was doing and had raised this issue with Mr Ganley.

[24] Mr Ganley denied this was the case, but stated that ongoing reviewing was necessary over the ensuing months, as it became clear that reviewing compilation jobs required an in-depth understanding of compilations which Mrs Hall-Morris did not possess; and it was important to him that any errors were corrected prior to the work being released as the maintenance of the high standards which were essential to the professional reputation of WWL.

[25] During September 2009 discussions took place between Mr Wells and Mr Ganley with a view to Mr Ganley being admitted as a director of WWL. Part of their considerations involved a restructure of the company as a result of which Mr Wells would concentrate on Iwi and farming work, and Mr Ganley would focus on specialist tax and accounting work.

[26] The proposed structure was finalised by late November 2009 and on Friday 4 December 2009, Mr Wells sent an email to all staff. The email was entitled "*Time for a Change*" and explained that he and Mr Ganley would be going into business together, and as a result there would be a restructuring of the existing business, with Mr Wells concentrating on Iwi and farming work and Mr Ganley on accounting work and specialist tax assignments. The email advised that the three positions most affected by the restructure would be the three Senior Accounting positions, and concluded by saying that there would be a full staff meeting on Tuesday 8 December 2009.

[27] Mrs Hall-Morris was on annual leave at this time, and on returning to work on Monday 7 December 2009, found the email dated 4 December 2009. Mrs Hall-Morris also realised that a new employee had joined WWL in her absence and upon checking the payroll, had discovered that this person had the same job title, salary and conditions of employment as herself. This person was Mrs Brenda Smith.

[28] The staff meeting took place on 8 December 2009. In Mr Well's absence on annual leave, Mr Ganley said he subsequently met with Mrs Hall-Morris, Ms Tattley, and Ms Smith, the Senior Accountants, individually following the meeting, to advise them that their positions were affected.

[29] In his meeting with Mrs Hall-Morris, Mr Ganley explained the details of the proposed restructuring, explained that Ms Brenda Smith had been appointed due to her experience in farming accounting, and advised Mrs Hall-Morris that her position was affected due to the Senior Accountant with responsibilities for special projects and due diligence position being disestablished. This meeting was followed up by a letter dated 8 December 2009, which stated:

> *We outlined to you that this is a proposal only at this stage and before we make a final decision we will invite you to provide feedback in writing (form attached) and in a further meeting on 11 December 2009.*
>
> *We will consider your feedback and meet with you again on 14 December 2009 at 2.00 pm to confirm our final decision as to the restructuring.*
>
> *You are invited to bring a support person along to any of the meetings if you wish.*

The date of the meeting had been altered in handwriting on the letter from 14 to 16 December and the time from 2.00 pm to 10.30 am, to reflect the fact that Mrs Hall-Morris would be on annual leave on 14 December 2009.

[30] Mrs Hall-Morris took legal advice following the meeting on 8 December 2009, and completed and returned the feedback form to Mr Ganley at the meeting on 11 December 2009. At the meeting Mr Ganley explained the reason for the restructuring as resulting from the non-availability of work in the areas of specialist project work and due diligence which had necessitated a change in direction for WWL. Mr Ganley asked Mrs Hall-Morris if there was anything further she wanted to add to her written feedback, and Mrs Hall-Morris suggested human resources and payroll work, and becoming an assistant to the practice manager.

[31] Following the meeting with Mrs Hall-Morris, Mr Ganley and Mr Wells considered the feedback form and Mrs Hall-Morris's further suggestions, including her comments that she was experienced in practice management and that she had worked with Mr Wells' Kiwi clients.

[32] In respect of the Practice Manager position Mr Wells and Mr Ganley considered that Mrs Hall-Morris was not as qualified as Ms Tattley to fulfil that position. Ms Tattley had been originally appointed as the Practice Manager, had a strong background in process management and also had responsibility for a large Corporate Client, which was work Mrs Hall-Morris was not qualified to undertake.

[33] In respect of the Senior Accountant for Iwi and farm accounting position, Mr Wells and Mr Ganley considered that Mrs Hall-Morris was neither as skilled nor as experienced as Ms Smith to undertake that position.

[34] Mr Wells explained that this was a highly specialised area for which many years experience was required prior to obtaining a high level of skill. Mr Wells further explained that WWL had for some time intended to specialise in the Iwi and farming sector, and as neither of the two existing Senior Accountants, being Mrs Hall-Morris and Ms Tattley, had the requisite skill set, recruitment for someone in this particular accountancy area had been commenced 2 years previously, with the recruitment process having been protracted as accountants with this particular skill set were relatively few in number.

[35] Mrs Hall-Morris, when questioned by the Authority, agreed that she did not have the skill or experience to undertake this particular role.

[36] In respect of the suggested Assistant to the Practice Manager position, Mr Ganley explained that as the Practice Manager role was a part-time, 2 days a week, position it was considered not viable to have an assistant.

[37] Mr Wells and Mr Ganley said they gave consideration to alternative positions for which Mrs Hall-Morris was suitable, but were unable to identify any.

[38] A third meeting was held on 16 December 2009. Mr Wells and Mr Ganley explained to Mrs Hall-Morris that her feedback had been considered, but that her proposals were not viable. As a consequence her position as a Senior Accountant had been disestablished and was redundant.

[39] Mr Wells stated that in the absence of an employment agreement, he considered 4 weeks notice to be appropriate and that in consideration of the redundancy situation, confirmed that Mrs Hall-Morris's salary would be paid until the end of January 2010, payment to this date representing an additional payment in excess of the 4 week notice period.

[40] Mrs Hall-Morris was asked if she would like to work her notice, or be paid in lieu of notice. Mrs Hall-Morris said she preferred to leave immediately and be paid in lieu of notice. The outcome of the meeting was confirmed in a letter dated 17 December 2009.

[41] Mr Ganley said that following the meeting with Mrs Hall-Morris on 16 December 2009, he met with Ms Tattley and Ms Smith and advised them that WWL was confirming them in their positions.

Determination

Whether the position of Mrs Hall-Morris was genuinely redundant

[42] The Court of Appeal in *GN Hale & Son Ltd v Wellington Caretakers IUOW*[1] clarified that:

> *An employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, re-organisation 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.*

[43] WWL said that Mrs Hall-Morris had originally been employed by WWL as a Senior Accountant with responsibilities for handling special non-compliance projects and due diligence matters. This was an area of work she was qualified to undertake and Mrs Hall-Morris does not dispute that during the latter part of 2008 and early part of 2009 work in this area had diminished. As a result WWL had given Mrs Hall-Morris responsibility for compliance work, and when this proved not suitable in July 2009, Mrs Hall-Morris had been given reviewing work.

[44] In September 2009 Mr Wells and Mr Ganley began to consider restructuring the business in light of the proposal that Mr Ganley become a Director, and of the economic situation, which had impacted on the operation and focus of WWL. This process finalised in late November 2009. In the finalised structure there was no ongoing requirement for a Senior Accountant specialising in special non-compliance projects and due diligence work.

[1] [1991] 1 NZLR 151

[45] Mrs Hall-Morris claimed that the bank proposal incident in July that year had been the motivation for the termination of her employment and that the redundancy was not a genuine redundancy.

[46] I find more credible the assertions of Mr Wells and Mr Ganley that this incident was irrelevant to their restructuring exercise, and note that at the time Mrs Hall-Morris had offered her resignation, but that this was not accepted. Instead WWL found Mrs Hall-Morris alternative work reviewing accounting compliance jobs. It was not until December, some 5 months later, that the restructuring exercise took place.

[47] I determine that Mrs Hall-Morris's employment was terminated as a result of a genuine redundancy on commercial grounds.

Whether WWL followed a fair procedure in making Mrs Hall-Morris redundant

[48] Section 103A of the Employment Relations Act 2000 ("the Act") sets out the test of justification:

> *For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether 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 the dismissal or action occurred.*

[49] Other provisions of the Act govern questions of justification for dismissal and, in particular, by reason of redundancy. Section 4 of the Act addresses the requirement for parties to the employment relationship to deal with each other in good faith. Section 4(1A)(c) in particular is relevant to a redundancy situation and requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee to provide to the employee affected:

> "(i) *access to information, relevant to the continuation of the employees' employment, about the decision; and*
>
> *(ii) an opportunity to comment on the information to their employer before a decision is made."* s4 (1A)(i) and (ii).

[50] In a redundancy situation 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 s4 of the Act. His Honour Chief Judge Colgan in *Simpsons Farms Limited v Aberhart*[2] noted that this compliance with good faith dealing includes consultation "*as the fair and reasonable employer will comply with the law*"[3]

[51] Mrs Hall-Morris had not seen the email dated 4 December 2009 due to her having been on annual leave on this date. The first time she saw the email was on her return to work on 7 December 2009. Mrs Hall-Morris attended the general staff meeting on 8 December 2009 when Mr Ganley informed all the employees about the proposed restructure, and had an individual meeting with him following this meeting at which further details of the proposal were discussed with her.

[52] This meeting was followed up by a letter dated that day which provided details of the proposal, enclosed a feedback form for Mrs Hall-Morris to complete and return, and invited her to a meeting to provide an opportunity for further feedback on 11 December 2009, with a further meeting to take place on 16 December 2009. I note that the letter invites Mrs Hall-Morris to have a support person present at both meetings, but that Mrs Hall-Morris had not availed herself of this opportunity. I note also that Mrs Hall-Morris took legal advice prior to the first of these meetings.

[53] At the meeting on 11 December 2009 Mrs Hall-Morris provided her feedback form and was invited by Mr Ganley to add any further feedback, and she did do so

[54] Mr Wells and Mr Ganley stated that they did give consideration to Mrs Hall-Morris's feedback suggestions, but that after that consideration, it was decided that

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[2] [2006] ERNZ 825,842
[3] Ibid at para [40]

they were not viable. At the final meeting on 16 December 2009, an explanation was provided to Mrs Hall-Morris as to the reason for not proceeding on her proposals.

[55] I find that there was genuine consultation in accordance with the principles as outlined in *Simpsons Farms Limited v Aberhart* [4]. There is no requirement that the consent of Mrs Hall-Morris was necessary following a proper consultation, which I find this was, and there was no need that there be an agreement between WWL and Mrs Hall-Morris as stated by the Employment Court in *Cammish v Parliamentary Service*:[5]

> *Consultation is to be a reality, not a charade. The party to be consulted must be told what is proposed and must be given sufficiently precise information to allow a reasonable opportunity to respond. A reasonable time in which to do so must be permitted. The person doing the consulting must keep an open mind and listen to suggestions, consider them properly, and then (and only then) decide what is to be done. However, consultation is less than negotiation and the assent of the person consulted is not necessary in the action taken following proper consultation.*

[56] Mr Grindle for the applicant submits that WWL pre-determined the outcome of the restructuring process which resulted in the termination on grounds of redundancy of the employment of Mrs Hall-Morris.

[57] I find that Mr Wells and Mr Ganley had considered the suggestions that Mrs Hall-Morris had made concerning her suitability for each of the other Senior Accountant positions in the new structure, but that they had reached the conclusion after consideration that she lacked the requisite skill and experience to satisfactorily qualify for either position.

[58] I have found that there was proper consultation with Mrs Hall-Morris. I am satisfied that WWL properly considered the feedback from Mrs Hall-Morris before finalising the decision to confirm Ms Tattley and Ms Smith in the roles of Practice Manager and Senior Accountant for farming and Iwi work.

[59] I determine that WWL followed a fair procedure in making Mrs Hall-Morris redundant.

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[4] at para [62]
[5] [1996] 1 ERNZ 404, per Goddard CJ at p417

Whether the failure to provide Mrs Hall-Morris with an employment agreement constituted a disadvantage in employment to Mrs Hall-Morris

[60] Employers are under an obligation to provide employees with an employment agreement pursuant to s 63A of the Employment Relations Act 2000 ("the Act"), which states:

> ***63A Bargaining for individual employment agreement or individual terms and conditions in employment agreement***
>
> *(2) The employer must do at least the following things:*
>
> *(a) provide to the employee a copy of the intended agreement, or part of the intended agreement, under discussion; and*
>
> *(d) consider any issues that the employee raises and respond to them*

[61] Section 65 is also relevant:

> ***65 Terms and conditions of employment where no collective agreement applies***
>
> *i. The individual employment agreement of an employee whose work is not covered by a collective agreement that binds his or her employer-*
>
> *1. must be in writing; and or her employer –*
>
> *2. May contain such terms and conditions as the employee and employer think fit*
>
> *ii. However, the individual employment agreement-*
>
> *1. must include-*
>
> *i. The names of the employee and employer concerned; and*
>
> *1. A plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90 days in section 114 within which a personal grievance must be raised*

[62] Further the Employer has a duty of good faith pursuant to s 4 (1A) (b) of the Act, which states at s4 (1A)(b):

> ***4 Parties to employment relationship to deal with each other in good faith***
>
> *(1A)*
>
> *(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative* (emphasis mine)

[63] As a result of the non-provision of an employment agreement despite repeated requests, Mrs Hall-Morris, at a time when her continued employment was under consideration, found herself uncertain as to:

a. The details of any redundancy entitlement to which she might be entitled;

b. The notice period in the event of termination of employment; and

c. The appropriate method for raising a personal grievance.

[64] I find that WWL acted in breach of the good faith requirement by not providing an employment agreement pursuant to s65 of the Act, and that this situation contributed to the stress felt by Mrs Hall-Morris during the restructuring process, and determine that this constituted an unjustifiable disadvantage in employment.

Remedies

Unjustifiable Dismissal

[65] Mrs Hall-Morris's employment at WWL was terminated on the basis of redundancy. I have found Mrs Hall-Morris was justifiably dismissed on the grounds of a genuine redundancy.

Unjustifiable Disadvantage

[66] I have found Miss Hall-Morris to have suffered a disadvantage in employment. Compensation of $4,000 is ordered to be paid to her by WWL, pursuant to s123 (1) (c) (i) of the Act.

Costs

Costs are reserved. Given the extent to which both parties have been successful I am of a mind that costs should be moderate, however, in the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, they may lodge and serve a memorandum as to costs within 28 days of the date of this determination with any reply submissions to be lodged with 14 days of receipt. I will not consider any application outside that timeframe.

Eleanor Robinson
Member of the Employment Relations Authority