

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2011] NZERA Christchurch 173  
5346007

BETWEEN                      NATALIA HALLIDAY  
   Applicant  
  
A N D                              SOUTH PACIFIC MEATS  
   LIMITED  
   Respondent

Member of Authority:        M B Loftus  
  
Representatives:              Georgina Burness, Advocate for Applicant  
   Graeme Malone, Counsel for Respondent  
  
Investigation Meeting        27 October 2011 at Christchurch  
  
Submissions Received:        At the investigation  
  
Date of Determination:        9 November 2011

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant, Ms Natalia Halliday, claims that she was unjustifiably dismissed from the employ of the respondent, South Pacific Meats Limited (SPM), on or about 9 October 2010.

[2]     SPM accepts that it dismissed Ms Halliday but is of the view that the termination was justified by reason of redundancy.

[3]     Ms Halliday does not dispute the underlying rationale, but is of the view that her termination was unjustified by virtue of the fact that one of her direct reports, Ms Carissa Stark, was retained. Ms Halliday believes that if anyone should have been retained it should have been her but, at the very least, she should have been allowed to compete for any residual roles.

## **Background**

[4] Ms Halliday was employed as a compliance manager at SPM's plant at Malvern. Malvern is (or more accurately, was) an abattoir with no freezing capacity and, as such, could only supply the domestic market. Some 80% of its production went to Progressive Enterprises Ltd (Progressive) under an agreement that was due to expire on 1 November 2010.

[5] Progressive, in negotiating the renewal of the agreement, was seeking an outcome which, in SPM's view, required it to renegotiate various terms and conditions with its staff. This had to be accomplished through negotiations with the NZ Meat Workers and Related Trades Union (Inc.).

[6] As events transpired SPM and the Union failed to reach agreement by a date which, from SPM's perspective, allowed sufficient remaining time for it to conclude an acceptable arrangement with Progressive.

[7] Concurrently SPM was engaged in a programme designed to bring the Malvern plant up to export standard. This involved the construction of freezing capacity followed by rebuilding of the two chains, one after another.

[8] The realisation that SPM would be unable to renegotiate a new agreement with Progressive and that it would no longer have a client for 80% of its production led to a conclusion that the plant was no longer viable as a domestic producer. That, along with the export standard reconstruction programme, led to a decision to close the plant and fast track the export standard rebuild as a concurrent project rather than the previously envisaged stage by stage approach.

[9] Staff, including Ms Halliday, were advised of this on 3 September 2010. They were told that the plant would close around the end of October. A definite date would be advised later and the staff's services would not be required thereafter.

[10] In her evidence Ms Halliday mentions various conversations she had with her managers prior to 3 September which canvassed the issue of compliance staff levels once Malvern acquired an export licence and the fact that the present compliment of two would most likely increase to five. She states that this made the advice that she was to be made redundant even more of a shock but accepted, when the issue was discussed during the meeting, that those conversations had occurred in an

environment where management expected to both obtain an export licence and have normal production for Progressive continue in the interim.

[11] Ms Halliday was also, at the time, pregnant. Unfortunately the outlook in that respect was not good. In early August scans had revealed foetal abnormalities and by the end of August it was determined that *the baby would not likely be compatible with life* (extract from medical evidence proffered by Ms Halliday).

[12] On 1 October Ms Halliday left work not knowing that subsequent events would mean it was to be her last day at Malvern. Over the weekend she noticed her baby was no longer moving and sought medical assistance. Ultrasound confirmed the demise of the baby which led to an induction of labour and Ms Halliday's baby girl was stillborn on 5 October.

[13] On 8 October Ms Halliday went to work and spoke to Malvern's manager, Mr Mark Kelly. She met Mr Kelly in his office and it was at that point that she was given a letter confirming her redundancy and advising that her final day would be 5 November. She then advised Mr Kelly, who had not been aware of the seriousness of the situation with her pregnancy, what had happened to the baby.

[14] Mr Kelly states that he was distressed by what he heard and in an attempt to assist Ms Halliday asked if she knew whether or not she would still be eligible for the State's paid parental leave. He says his thinking was that this would give an immediate income source guaranteed for three months at a rate better than the unemployment benefit which appeared, with Canterbury's immediate post earthquake economy, to be where Ms Halliday was heading. He says that he did not know the answer, advised Ms Halliday accordingly, and suggested she go to Inland Revenue and inquire.

[15] Mr Kelly states that Ms Halliday returned the following day and advised that she was eligible for paid parental leave (in accordance with Part 7A of the Parental Leave and Employment Protection Act 1987). She had the required forms and asked that Mr Kelly sign them. He did and followed that up with the requisite payroll action.

[16] Ms Halliday is now suggesting that she was pressured to go on parental leave and that she was begging Mr Kelly to allow her to perform any work he may possibly have had available. Mr Kelly denies pressuring Ms Halliday and states that on the

day (9 October) she expressed pleasure at the fact that she could *get something*. He does accept that she asked to be allowed to perform work but states that she suggested she would only be available for the odd hour or two. He says, and Ms Halliday accepts, that she expressed a desire to maintain contact with the company and went so far as to express a willingness to work unpaid. He accepts, as Ms Halliday alleges, that he told her *not to worry as he had things in hand*, but attributes this to the fact that he then expected to be able to perform all required tasks himself.

[17] Ms Halliday then proceeded, as planned, onto maternity leave. Malvern paid her up to and including 7 October and she received her holiday pay and other cessation payments in the pay period ending 30 October. Inland Revenue picked up responsibility via the parental leave payment system with effect 9 October.

[18] It was only subsequently that Ms Halliday became displeased with her situation. Through a conversation or two with Ms Stark, and other information that she gleaned, she became aware that Ms Stark was still engaged at Malvern. SPM accepts that Ms Stark remained. It appears that her redundancy was processed but she was re-engaged as a casual to perform some residual tasks. It was initially envisaged that this arrangement would continue for no more than two weeks but to use Mr Kelly's words, Ms Stark made herself indispensable. This was due to a combination of two factors. First she was willing to do anything and this included sweeping and cleaning. Second, Mr Kelly found himself increasingly engaged in tasks he had not envisaged such as ones generated by the resource consent process emanating from the construction project. SPM is adamant in its denial of Ms Halliday's claim that Ms Stark continued to perform a number of compliance tasks and Ms Halliday is not in a position to offer evidence supporting her claims. As events transpired, Ms Stark's casual arrangement continued into the third quarter of 2011 but she has now departed.

[19] As was said in the introduction Ms Halliday, having become aware that Ms Stark was still working at Malvern, formed the view that she should have at least been allowed to compete for the performance of any available work and the fact that she had not been so allowed had, in her view, rendered her dismissal unjustified. She formally raised her grievance with Malvern via a letter dated 9 February 2011 and while, arguably, that is outside the 90 day limit for raising a grievance SPM chose to waive that defence. Unfortunately natural events such as earthquakes delayed pursuit

of the grievance and subsequent discussions failed to remedy it, hence the investigation meeting.

### **Determination**

[20] Ms Halliday claims she was unjustifiably dismissed. SPM accepts it dismissed Ms Halliday but contends that the dismissal was a justifiable redundancy.

[21] It is well established that:

*When reviewing an employer's decision to make employees redundant, the Authority or Court will generally look at two initial factors: the genuineness of the redundancy; and whether the dismissal was carried out in a procedurally fair manner.*

Kevin Leary (ed) *Employment Law* (looseleaf ed, Brookers) at ER103.17

[22] The obligation referred to above is reflected in the test of justification contained in section 103A of the Employment Relations Act 2000. Whether the decision to dismiss is 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 ... occurred*”.

[23] The test of justification referred to in [22] above is that which existed prior to an amended version coming into force on 1 April 2011. It is used as the dismissal being considered here occurred prior to the change coming into force. Section 7 of the Interpretation Act 1999 provides *An enactment does not have retrospective effect*. Section 4 makes it clear that all enactments are subject to the Interpretation Act 1999 unless the enactment provides otherwise. Applying the new statutory test to this dismissal would be giving it retrospective effect without that being expressly or impliedly provided for in the Act (as amended). I conclude that justification must be assessed in accordance with the law prior to 1 April.

[24] As said earlier Ms Halliday does not, at least from a conventional perspective, challenge the substantive rationale behind the decision to declare her position redundant. Whilst she expressed the view that the decision came as a shock due to earlier talk about an increase in the number of compliance staff, she accepts those conversations occurred in a different environment and that, at the time, SPM did not

envisage a situation in which it could not renew its agreement with Progressive (see 10 above).

[25] Procedural challenges in a redundancy setting often emphasise a lack of consultation and while the evidence suggests that may have been a possible claim here it shall not be considered further. This is due to the fact Ms Halliday did not allege that the consultation was inadequate and, as a result, the evidence did not fully canvass the issue.

[26] Ms Halliday's challenge is narrow in scope. She is alleging that a member of her staff was retained and that the duties performed by that employee had previously been part and parcel of her normal duties. She claims that she should have been allowed to perform that work but, at the very least, she should have been given a chance to compete for it. In essence she is mounting a substantive challenge, albeit very narrow and informed by hindsight, on the grounds that retention of another to perform her work undermines the substantive rationale for her redundancy.

[27] I am of the view that Ms Halliday's claim must fail and that SPM can establish that its actions were those of a fair and reasonable employer.

[28] First there is the contention upon which Ms Halliday founds her claim – namely that Ms Stark remained to perform duties that were previously Ms Halliday's.

[29] SPM's response is that the roles filled by Mesdames Halliday and Stark were no longer required. The compliance function ceased when production ceased and Ms Stark was advised of her redundancy and paid off accordingly. She remained available on a casual basis and then made herself indispensable as a general dogsbody who was willing to pick up almost all and every task and while the need for such assistance was not originally envisaged or planned, it became evident as a result of the fact that Mr Kelly got bogged in tasks such as resource consent processes tied to the plant's reconstruction. SPM is adamant that the work being performed by Ms Stark bore no resemblance to her earlier role as a salaried employee.

[30] I accept that evidence, and note that Ms Halliday's contentions are reliant on second-hand information and innuendo and that she was unable to offer concrete evidence to contradict SPM's position. Acceptance of SPM's position also means that the decision to disestablish Ms Halliday's position is not undermined by the retention of tasks she previously performed.

[31] SPM's second argument is probably more pertinent. SPM is of the view that Ms Halliday was, quite voluntarily, on parental leave. As such she was unavailable for work and even if willing to perform anything that may have been available, she was precluded from doing so as a return to work, even on a short term casual basis, would have cancelled her entitlement to paid parental leave (refer s.71L(1)(b) of the Parental Leave Act). This brings into focus what is, in my view, a crucial debate between the parties. On one hand Ms Halliday says she was forced onto parental leave, whilst on the other the company is of the view she went voluntarily. Resolution of this issue lies in the discussions of 8 and 9 October.

[32] Again I feel compelled to accept SPM's view. In doing so I do not suggest that Ms Halliday is trying to mislead me. What I am saying is that I do not believe that her state of mind was such that she had any real idea of what was going on and what she was doing. In support of this conclusion I again refer to the medical evidence she herself proffered. Contained within the midwife's report is a statement which reads:

*Natalia's emotional state through this time was, understandably, very fragile. ... The weeks that followed (the stillbirth) were grief filled and Natalia was diagnosed with postnatal/post traumatic stress disorder and medicated for her depression. It is my opinion that the stresses involved in the pregnancy, labour, stillbirth, and postnatal period were the cause of Natalia's diminished capacity to function day to day with the demands of work and family life, which she had previously managed with ease and confidence.*

[33] Even Ms Halliday herself accepts *my mind was all over the place. It was very surreal. I was very traumatised.*

[34] Her state at the time can best be illustrated by the fact she could not remember how she was given the letter confirming her redundancy – whether it was mailed to her or hand delivered and if the latter, by whom.

[35] In such circumstances, and as said earlier, I accept the company's view of what occurred. Such acceptance means that Ms Halliday was voluntarily on maternity leave and could not be engaged on any work that may have been available.

[36] Finally comment should be made about claims that SPM's attitude toward Ms Halliday took a negative turn when she advised them of the pregnancy; that

Mr Kelly made a derogatory comment about the pregnancy and that others did likewise. I take these issues no further for the following reasons:

- a. These claims did not form a claim *per-se*, but were proffered in support of the contention Ms Halliday had been unjustifiably dismissed;
- b. There is no concrete evidence to support the claim that Ms Halliday was negatively treated after advising her pregnancy. I consider the claim improbable given her state of mind and the lack of any rationale as to why this would now occur given her own evidence that SPM had been extremely supportive during earlier pregnancies;
- c. Mr Kelly's adamant denial of the one alleged comment; and
- d. Ms Halliday's acceptance that she took comments from others as attempted humour and, more importantly, did not advise SPM of her dissatisfaction or otherwise take the matter further at the time. SPM was not, therefore, in a position to address the allegations and any disquiet Ms Halliday may have felt.

[37] For these reasons Ms Halliday's claim must fail and it is, therefore, dismissed.

### **Costs**

[38] I reserve the issue of costs. I ask that the parties try to resolve the issue but failing that, and in the event SPM wishes to seek costs, it is required to lodge and serve an application within 28 days of this determination. Ms Halliday is to file any response within 14 days of the application.

M B Loftus  
Member of the Employment Relations Authority