

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 282
5408721

BETWEEN

DIANNE HEARN
Applicant

A N D

CABLE BAY WINE LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Philip Kotze, Advocate for Applicant
Loukas Petrou, Advocate for Respondent

Investigation Meeting: 24 April 2013 at Auckland

Date of Determination: 4 July 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Hearn) alleges that she was unjustifiably dismissed for redundancy or in erroneous reliance on a trial period of employment under s.67A of the Employment Relations Act 2000 (the Act). The respondent employer (Cable Bay) resists both those allegations.

[2] Ms Hearn was employed by Cable Bay's predecessor in title in May 2009 as an accounts support person and in April 2011 was offered and accepted the position as accounts manager.

[3] That former employing entity was placed into receivership in September 2012 and the assets were purchased by the present respondent (Cable Bay). One of the directors of Cable Bay, Neill Culley, was intimately involved in Cable Bay's predecessor in title as a founder and director so has a long history with the whole business.

[4] Cable Bay purchased the assets of the predecessor business and commenced trading on 1 October 2012. A specific term of the sale and purchase agreement was that all employees of the predecessor company would have their employment terminated and Cable Bay says that all continuing employees (including Ms Hearn) were employed on a trial period commencing 1 October 2012.

[5] It was explained to the Authority that the purpose of this trial period was to enable the new entity to establish what skills it had and how that matched to what skills it needed. It was indicated to the Authority that Cable Bay intended to review all areas in the business on a progressive basis.

[6] Shortly after the commencement of trading by the new entity, the directors of Cable Bay, Mr Culley and Mr Loukas Petrou, spoke to a staff gathering and emphasised the precarious position that the business had been in and, according to Mr Culley, indicated to staff that the future would involve “more change” and “more pain”. Mr Culley referred in his evidence to talking about a change in the firm culture being required. It is clear that Ms Hearn attended that meeting and common ground that while there were general expressions of view by the directors about the need for change, even the directors themselves acknowledged to the Authority that there was no specific reference to the possibility of job losses and it seems common ground that the word redundancy was not used.

[7] Cable Bay maintains that it told staff it needed “time to understand the business and to finalise the organisational and management structure” and while that is accepted, its further claim that it told staff that “numbers of staff were not sustainable and this will change” is not accepted.

[8] There was a second meeting with staff on 6 November 2012. Cable Bay says that staff were advised at that meeting that the kitchen management structure and resourcing was finalised, that the directors were then working on front-of-house and would then be moving to review the administration and finance structure. It is, of course, in the latter area that Ms Hearn was employed.

[9] At this second staff meeting, Cable Bay’s evidence is that the directors were specific that more positions would be eliminated “as the business could not afford to keep everyone on board”. Mr Petrou remembers saying something to the effect that in order to keep the business going, some employment agreements would not be

confirmed and that the new business could not go down the same path as the previous one. Again, Ms Hearn was present at this meeting.

[10] When Cable Bay came to review the finance and administration area, it is apparent on the evidence that it formed a negative view of Ms Hearn's absence of accounting qualifications. Mr Petrou in particular as a new director formed the view that the predecessor business had very poor financial systems in place and understandably he sought to address that. The directors of Cable Bay advertised and recruited a qualified accountant while Ms Hearn was still in the employment. There is dispute about whether the new incumbent is qualified; for the record, the Authority is satisfied that she has appropriate accounting qualifications. Cable Bay says that during that recruitment process, it formed the view that the incoming accountant could, as well as performing her high level financial responsibilities, fulfil the more basic requirements of Ms Hearn's job as well. The effect of that amalgamation of roles was to create a full time accounting position whereas without such an amalgamation of roles, the new accounting position would have been part time only.

[11] A meeting was held with Ms Hearn on 7 December 2012 at which she was told her employment was to be terminated on the grounds of redundancy and that her position was to be amalgamated with the position of accountant and fulfilled by a new employee who was about to start in the employment. It is common ground that this meeting was not a consultation meeting but constituted an announcement by Cable Bay that Ms Hearn's position had disappeared. It also appears to be conceded by Cable Bay that Ms Hearn was not advised to get advice, was not told that she could have a support person present for the meeting but was told that she would be paid beyond her ordinary notice period if she facilitated the handover with the new staff member who was joining Cable Bay within a day or so of that meeting.

[12] Ms Hearn's demeanour at the meeting is in dispute; Cable Bay says that she was calm and indicated that she expected the redundancy and that it was not a surprise whereas Ms Hearn herself says that she was devastated and in "obvious distress" at the meeting.

[13] There was an aborted meeting between the parties in early January 2013 but by then Ms Hearn had already raised her personal grievance with the employer. The matter was subsequently filed in the Authority.

[14] The original statement of problem identified Cable Bay and both directors as, in effect, joint respondents. For the avoidance of doubt, at the commencement of the investigation meeting, the Authority clarified the position with the parties. It is agreed that the only respondent is Cable Bay; it is apparent to the Authority that Cable Bay is the employer and it is to the employer that Ms Hearn must look for remedies, if any.

Issues

[15] The Authority must consider the following matters:

- (a) Was a genuine trial period in place;
- (b) Was this a genuine redundancy;
- (c) Did Cable Bay adequately consult with Ms Hearn;
- (d) Are any remedies due to Ms Hearn?

Was a genuine trial period in place?

[16] The Authority is satisfied that there was no genuine trial period in place. Cable Bay has referred throughout its evidence to the existence of a trial period in relation to Ms Hearn's employment and on occasion it seems to be contended that Ms Hearn was dismissed pursuant to that trial period.

[17] For instance, in the first four paragraphs of the statement in reply, Cable Bay refers to Ms Hearn being employed on a trial period but also to the prospect of her being made redundant. As a matter of fact, the letter terminating her employment sent by email on 9 December 2012 refers exclusively to the termination of the employment being for redundancy; there is no mention whatever of the trial period being relied upon.

[18] However, for the avoidance of doubt the Authority feels obliged to observe that the trial period provision in the employment agreement, had it been relied upon, would not have been efficacious as it does not comply with the law.

[19] Ms Hearn maintains that she was not told that she was on a trial period and if that were true, that would be fatal to reliance on a trial provision. However, that claim by Ms Hearn is contested and the Authority takes that particular point no further. What is incontrovertible is that Ms Hearn was not provided with her written

employment agreement until three weeks after the employment commenced and, on that basis, she was an existing employee and so, as a matter of straightforward interpretation of s.67A of the Act, could not be a person subject to a trial period.

[20] Furthermore, the actual provision in the employment agreement is defective in that it fails absolutely to make clear that by virtue of its presence in the agreement, Ms Hearn lacks personal grievance rights. The law is clear that the Courts will interpret these provisions strictly because they remove ordinary statutory rights that most employees enjoy. It follows that failure to comply with the strict letter of the law in respect of these provisions will cause them to be of no force or effect.

Was this a genuine redundancy?

[21] It is trite law that the Courts will not lightly interfere in a management decision to restructure a business to ensure its continued existence. In effect, that was the position Cable Bay found itself in. While the Authority heard only a limited amount of evidence on the point, it is satisfied that the recent history of Cable Bay's predecessor was turbulent, that the business failed, went into receivership and then liquidation, and that the assets were sold to Cable Bay.

[22] Further, it is plain on the evidence that Cable Bay determined to offer continued employment to all staff who wished to carry on but on the footing that the structure of the new enterprise going forward would need to be settled on before any genuine security of tenure could be offered. The Authority observes in passing that Cable Bay's reliance on its trial provision, which apparently was in all the employment agreements, is misplaced because it did not comply with the law, but that aside, the Authority accepts as a broad principle that Cable Bay intended to offer only short term employment to continuing staff until it had assessed its permanent requirements.

[23] In principle then, the Cable Bay restructuring would seem to have proceeded on generally understood principles. However, Ms Hearn protests that her position has not disappeared at all but is effectively still being performed within the business so presumably, the argument goes, her position is not truly redundant.

[24] But that view does not fully account for all of the facts. It is plain on the evidence that, under the predecessor to Cable Bay, the financial direction of the company was provided by a director who was financially trained and Ms Hearn

worked to that person. Under the new ownership, financial direction was to be provided in-house. The directors decided they needed a financially trained person. Ms Hearn did not have financial qualifications. Accordingly, on Cable Bay's analysis of its business needs, Ms Hearn could not aspire to the position they proposed creating which would subsume her existing role within it.

[25] It follows that while Cable Bay might be accused of being clumsy and even hurtful in the way in which it introduced the new person, particularly given she was recruited while Ms Hearn was still employed and before Ms Hearn knew that her job was indeed under threat, Cable Bay cannot be said to have failed to initiate a genuine redundancy.

[26] In the Authority's view, all of the elements of a genuine redundancy are present; there was a significant financial crisis, there was a restructure, there was a redesigned position which required particular skills that the incumbent did not have, there was a recruiting of a person with the appropriate skills, and the consequent disestablishing of the incumbent's role. While the Authority is satisfied a genuine redundancy situation is in place here, the clumsy way in which Cable Bay attended to this restructure may sound in compensation.

Did Cable Bay adequately consult with Ms Hearn?

[27] The Authority has no hesitation in concluding that Cable Bay's consultation approach with Ms Hearn was fatally flawed. First, the Authority accepts without reservation that Cable Bay conducted two whole of staff meetings after the purchase of the business to discuss the way forward. Those meetings formed appropriate background and would have been a viable part of a consultation process.

[28] But without specific engagement with affected individuals on a personal basis, it is difficult to see how Cable Bay could meet its legal obligations. The level of specificity required in engaging with individual affected staff is simply not present in the present factual matrix. While the strategic vision has clearly been adequately dealt with, the tactical engagement with affected individual staff is wholly absent.

[29] In fact, the only individual engagement with Ms Hearn was the meeting on 7 December 2012 about which she got no warning, which simply announced to her that her position had been disestablished because it was being amalgamated with

another position, the new position to be filled by an already recruited employee with an accounting qualification.

[30] What should have happened is that Ms Hearn should have been told what Cable Bay's provisional conclusion was in respect of the restructure, told about the priority Cable Bay had for professional qualifications, and then invited to engage with the employer in its process.

[31] In the particular circumstances of this case, while it seems unlikely that Ms Hearn would have been able to come up with a scenario that would have met Cable Bay's needs and at the same time enabled her to keep some form of continuing employment, at least because of her absence of professional accounting qualifications, it is nonetheless a completely inadequate process for an employer to present the affected employee in a redundancy situation with what Ms Hearn's advocate correctly referred to as a *fait accompli*.

[32] In truth, Ms Hearn was not consulted at all but rather told what Cable Bay's intention was before she had any opportunity to engage with the employer and potentially suggest other solutions.

[33] Apart entirely from the fact that there was in the present case no consultation at all, Cable Bay also failed to alert Ms Hearn to the fundamental reality that her qualifications were simply insufficient for her to aspire to the role that Cable Bay proposed to create. Given that was a fundamental issue for the employer, as the law stands at present, the Authority is satisfied that it has an absolute obligation to make that clear to Ms Hearn: *Vice Chancellor of Massey University v. Wrigley & Ors* [2011] NZEmpC 37.

[34] In the same general connection, the failure of Cable Bay to make clear to Ms Hearn that there were also deficits in her work, if indeed that was the case, is also a breach of Cable Bay's obligations. The Authority refers to this aspect because in the evidence for Cable Bay, it was made absolutely clear that there were concerns about some aspects of Ms Hearn's work but no evidence whatever that anybody bothered to tell her about that. Certainly her evidence to the Authority was that she was oblivious of those concerns and the Authority accepts that evidence at face value.

[35] Conversely, Cable Bay directors seem to suggest in their evidence that perhaps the former general manager of Cable Bay may have drawn to Ms Hearn's attention

her deficiencies, but again the evidence from that individual suggests that there was no such conversation. Moreover, Cable Bay's own employment agreement requires the employer to "carefully appraise and monitor" the employee's performance. Given that obligation, it is plain that the employer was in breach of that commitment as well.

[36] In all the circumstances, the Authority is satisfied that there has been a total failure in Cable Bay's obligation to consult with Ms Hearn as part of its legitimate restructure. Ms Hearn was simply given no opportunity to participate in Cable Bay's process, as the law requires. She was never told about the primacy of an accounting qualification and never told about the employer's view that her role could be subsumed within a new role of financial accountant; she was simply told what was going to happen to her job and that in consequence, her employment was to come to an end.

Are any remedies due to Ms Hearn?

[37] Given the finding the Authority has just made about the failure to consult by Cable Bay, the Authority must conclude that Ms Hearn has a personal grievance. However, that personal grievance is not for unjustified dismissal because the Authority is satisfied on the facts that this was a genuine redundancy undertaken for proper reasons. The fact that its implementation was so significantly flawed does, however, create a personal grievance for unjustified disadvantage.

[38] It is apparent to the Authority from the evidence it heard that Ms Hearn suffered significant hurt, humiliation and injury to feelings by reason of the unjustified way she was treated in the course of the redundancy process.

[39] While she cannot be compensated for the loss of the employment (the redundancy being genuine), she certainly is entitled to be compensated for the thoroughly unsatisfactory process adopted by Cable Bay which simply dumped on her its conclusion that her position had gone without giving her any opportunity at all to have any engagement with the employer about the restructuring process.

Determination

[40] Ms Hearn has satisfied the Authority that she has a personal grievance because she has suffered disadvantage because of the unjustified actions of Cable Bay in the

way in which the employer instituted its decision to disestablish her position, in particular by Cable Bay's complete failure to consult with her as the law requires.

[41] The Authority has considered whether Ms Hearn has contributed in any way to the circumstances giving rise to her grievance and is satisfied that there is no contributory behaviour: s.124 of the Act applied.

[42] Because Ms Hearn's personal grievance is not for unjustified dismissal, the Authority is only able to contemplate compensation for the particular hurt done in the implementation of the redundancy and not for the consequences of the loss of the position which, as the Authority has found, was activated by genuine motives. Accordingly, the Authority cannot award any contribution to lost wages which Ms Hearn has suffered.

[43] To remedy Ms Hearn's grievance then, the Authority directs that Cable Bay Wine Limited is to pay to her compensation under s.123(1)(c)(i) of the Act in the sum of \$6,000.

[44] In addition, Cable Bay is to pay to Ms Hearn the Authority filing fee of \$71.56.

Costs

[45] Costs are reserved but if the parties are unable to resolve costs on their own terms, either party may make an application to the Authority for costs to be fixed. If such an application is made, the applying party must serve the application for costs on the other party and the other party then has 14 days from that date to file their submissions in the Authority.

James Crichton
Member of the Employment Relations Authority