

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 174  
5379090

BETWEEN                      NENA HERGATT  
   Applicant  
  
A N D                              HBC DESIGN LIMITED  
   Respondent

Member of Authority:      K J Anderson  
  
Representatives:            M Steele, Counsel for Applicant  
   R Alchin, Counsel for Respondent  
  
Investigation Meeting:     7 November 2012 at Hamilton  
  
Submissions Received:    6 December 2012 and 17 January 2013 for Respondent  
   20 December 2012 for Applicant  
  
Date of Determination:    9 May 2013

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**DETERMINATION OF THE AUTHORITY**

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**Introduction**

[1]     The applicant, Ms Nena Hergatt, claims that she was unjustifiably dismissed on or about 28 March 2012. The respondent, HBC Design Limited, rebuts the claim of Ms Hergatt and says that because of changes within the operations of the business, including the necessity to employ a person with a broader range of skills, the position held by Ms Hergatt was genuinely redundant.

**Background**

[2]     HBC Design Limited (HBC) is the largest architectural design company in the Hamilton/Waikato region. The managing director and sole shareholder of the company is Mr Pargat Singh. The evidence of Mr Singh is that around mid-June 2011, HBC advertised for a business manager but there was not a suitable applicant. Mr

Singh attests that Ms Hergatt was one of the applicants for the position of business manager. She was interviewed but was considered not to have the necessary skill set to meet the full criteria of the job description for the role. However, upon Ms Hergatt subsequently meeting with Mr Singh, she convinced him that given the opportunity to do so, she would be able to meet the requirements of the job. Ms Hergatt commenced her employment with HBC on 16 June 2011.

[3] On 16 September 2011, Ms Hergatt had a non-work related accident; damaging her shoulder, with the consequence being that she required two days off work. The evidence of Mr Singh is that Ms Hergatt attended work with her arm in a sling.

### **Absence from work**

[4] On 3 November 2011, Ms Hergatt needed to have surgery on her shoulder as a result of the September accident. The evidence of Mr Singh is that a few days prior to the surgery, Ms Hergatt came to his office and advised that her expected recovery would take two or three months at a minimum. Mr Singh says that Ms Hergatt was aware that HBC was planning for the establishment of a new office in Auckland and she enquired whether her absence would affect her ongoing employment. The evidence of Mr Singh is that he informed Ms Hergatt that he had not given any consideration to the effect of her absence as he had only then become aware of the circumstances: he advised Ms Hergatt to keep him informed about her post-surgery progress and her likely return to work.

[5] The evidence of Ms Hergatt is that shortly after her surgery, she went to the HBC offices, to give a medical certificate to Mr Singh, but he was absent at the time. Ms Hergatt says she had to be driven to the HBC office by a friend as she was unable to drive because of her injury.

[6] On 21 December 2011, Ms Hergatt sent an email to Mr Singh. She informed him that she was aware that her ACC case manager had been keeping Mr Singh informed of her progress following the surgery. Ms Hergatt conveyed that while she was making slow progress with her rehabilitation, she did not require any further surgery. Nonetheless, she had a medical certificate indicating that she required a further six weeks off work. In conclusion, Ms Hergatt informed that:

I was hoping to be coming back to work after New Year/holidays but with my arm having to be in the sling for the next six weeks and the pain, that won't be happening. My next appointment with the surgeon is 27 January when I will be assessed again. I am hoping that I will be out of the sling permanently by then and off the pain killers that put me to sleep. When I am able to come back to work it may be part-time to start with. I can understand your "annoyance" about me being off work but I certainly didn't want this for myself let alone my workplace. Hope all is going well at work.

Regards,  
Nena

[7] Mr Singh responded by return email dated 30 December 2011. He thanked Ms Hergatt for the "update" and expressed the hope that her recovery would proceed well. Mr Singh also informed that he had been contacted by "all sorts of case managers, rehabilitation people". Mr Singh also conveyed that because of the length of Ms Hergatt's absence, he had employed a student until the end of February or perhaps into March 2012. The email concluded: "... towards the end of that period I will update you ....".

[8] The evidence of Mr Singh is that the mention of the "student" in his email (above) related to an architectural student who was employed over the holiday period. This person was able to combine administration duties and those of an architectural technician. Mr Singh also attests to opening another office in Flat Bush, Auckland, with the expansion adding approximately an extra 30% to the workload of the company. As a result of the apparently, unanticipated growth, it became clear that the business required an increased degree of financial management across its three offices.<sup>1</sup> Mr Singh says that there was a particular requirement in relation to the office in India, where the bulk of the company's work is completed.

[9] As a consequence of the increased requirements of the business, Mr Singh engaged a financial controller to oversee the operations of the three offices. The person appointed was well qualified with a Masters Degree in Business Management, an MBA, and he is also fluent in the Hindi language. The financial controller was engaged as an independent contractor rather than being an employee.

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<sup>1</sup> In Hamilton, Auckland and Chandigarh - India

[10] It appears that there was no direct contact between Ms Hergatt and Mr Singh after 30 December 2011; until Ms Hergatt sent an email to her employer on 22 March 2012. Ms Hergatt conveyed that she had become aware that Mr Singh had indicated to her occupational therapist that he was not prepared to meet with the therapist and that he wished to meet with Ms Hergatt alone. She inquired as to why this was so and when did Mr Singh envisage that a meeting with her could take place.

### **Redundancy**

[11] The evidence of Mr Singh is that the reference to the occupational therapist relates to advice he received from this person (approximately mid-March) that Ms Hergatt may possibly be ready to return to work in several weeks time on a part-time basis. Mr Singh says that he was advised by the therapist that full-time work and complete rehabilitation for Ms Hergatt was several months away. Mr Singh attests that because of the changes that had occurred during the absence of Ms Hergatt, including the appointment of a financial controller; in addition to general changes that had been made to accommodate the absence of Ms Hergatt, and the fact that Ms Hergatt was not going to be fit for full-time employment for some months yet, he concluded that there was, in reality, now no position available for her.

[12] Hence Mr Singh responded to the email from Ms Hergatt (22 March 2012), via an email dated 28 March 2012. Mr Singh confirmed to Ms Hergatt that the occupational therapist had contacted him and advised that Ms Hergatt may be available for part-time work but her full fitness was not yet assured. Mr Singh then informed:

But I regret to inform you that after consideration the situation of business manager is no longer available here at HBC.

Other alternatives have been explored during your more than lengthy absence.

After carefully (sic) consideration during the course of the night following [the occupational therapist] email and discussions with other work colleagues, the position of business manager is no longer available at HBC . . . and we have chosen to persist with the systems we have developed during your absence. Another architectural technician, who can do a few hours per day of basic admin work, is now more suited to our requirements. This was tried with a Junior we employed over the Xmas holiday period and worked better than we expected. During your absence I have also established another office in Flat Bush, Auckland, which is now adding 30% extra work to HBC. I have also had ongoing issues with the management of the

India office not being able to cope with the extra growth. As a result of this I have appointed a financial controller to oversee all three offices. The person I have chosen has an MBA and a Masters in Business Manager and is able to fluently speak Hindi. Because cash flow funds are not readily available at present, this person will gradually increase his hours but will take about one year to become full-time.

For financial reasons this new structure is done at the expense of the business manager position. The only other job positions we have here at HBC is for full-time qualified architectural technicians. You are unsuitable for this situation.

I am away to India from next Wednesday for an extended length of time, if you wish to come in and discuss this personally you are free to organise a time before I go.

Regards and best wishes for your future.

Pargat

[13] Mr Singh's evidence is that the purpose of this email was to ensure that Ms Hergatt was fully aware of "the situation" before coming to see him; to discuss her future with the company.

[14] However, Ms Hergatt says that upon receiving Mr Singh's email, she concluded that her employment had been terminated and she felt "frustrated" that Mr Singh had failed to consult with her regarding her position. Ms Hergatt attests that when she received the email she was ready to come back to work full-time and had been ready since about 20 March 2012. But this cannot be so as the evidence before the Authority is that Ms Hergatt was not medically fit to resume full-time work until 21 May 2012, as confirmed by a medical certificate dated 17 May 2012.

### **Meeting between Ms Hergatt and Mr Singh**

[15] A few days after 28 March 2012,<sup>2</sup> Ms Hergatt visited Mr Singh at his office. She did not give any notice of her visit. She says that she went to the office to collect her belongings and whilst there, she asked if she could speak to Mr Singh. There is some difference between the evidence of Ms Hergatt and Mr Singh as to the overall context of the discussion between them. Nonetheless, it is established that Ms Hergatt had sought legal advice before meeting with Mr Singh.

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<sup>2</sup> The date has not been identified but it was most likely to have been either 30<sup>th</sup> March or 2<sup>nd</sup> or 3<sup>rd</sup> of April 2012, given that Mr Singh indicated that he was travelling to India on or about 4 May 2012.

[16] The written evidence of Ms Hergatt is that her solicitor had advised her to raise two possible options with Mr Singh. The first option was that she would accept one month's wages but in the event that this was not agreed to, Ms Hergatt would advise Mr Singh that she would seek further legal advice. The written evidence of Ms Hergatt is that she put these options to Mr Singh.

[17] However, the oral evidence of Ms Hergatt is that she told Mr Singh that he could pay her one month's pay in lieu of notice or she would: "*Take the matter to Court*". Ms Hergatt told the Authority that when Mr Singh responded that: *It will have to be the Court*" - she left his office.

[18] The evidence of Mr Singh is that Ms Hergatt told him that she had suffered a further setback and that full recovery would now be a further few months away. Mr Singh says that Ms Hergatt told him that she wanted to be paid for one month "*or she would sue me*". It is the evidence of Mr Singh that Ms Hergatt told him that she had done this before on more than one occasion and would have no hesitation in suing him if he did not meet her demands.

[19] While the evidence of Mr Singh and Ms Hergatt has a somewhat different emphasis in regard to when or how legal proceedings might occur, the current proceedings before the Authority are now the outcome. Ms Hergatt says that she was unjustifiably dismissed, citing the failure of HBC to adequately consult with her about the redundancy of her position.

### **Analysis and conclusions**

[20] The evidence of Mr Singh is that he was disappointed with the attitude of Ms Hergatt when she met with him, as recorded above. Mr Singh attests that he believed that Ms Hergatt could have taken the opportunity, if she so wished, to discuss the possibility of other employment within HBC. Mr Singh says that if Ms Hergatt had raised any ideas regarding her future with the company, he would have taken those into consideration. But I find that this is most improbable given that Mr Singh had expressly indicated in his email to Ms Hergatt on 28 March 2012 that the only other positions available within HBC related to qualified architectural technicians, and Ms Hergatt did not meet the requirements for this role. And at the conclusion of email message, Mr Singh conveys his best wishes to Ms Hergatt "for your future".

[21] Given the content of the email of 28 March 2012, I accept that Ms Hergatt was reasonably entitled to conclude that her position was no longer available and that her employment was about to be terminated. However, I do not accept that it was reasonable for her to conclude that the termination was immediate, given that Mr Singh had indicated that she should come in and discuss matters personally with him; albeit I am bound to say that given his impending departure for India, he was not allowing much time for any discussion and effectively, Ms Hergatt had been presented with a *fait accompli*.

[22] I conclude that it was somewhat premature for Ms Hergatt to threaten Mr Singh with legal action before entering into some discussion to clarify what was happening regarding her position, and when. Nonetheless, given that the generic employment agreement (clause 12.1) provides for termination of the agreement with four weeks' notice in writing to the employee, it would have been a simple matter for Mr Singh to have concluded matters with Ms Hergatt simply by paying her one month's pay in lieu of notice. Indeed, if Mr Singh had acquainted himself with this term of the employment agreement, and acknowledged the notice period, this matter, most probably, would not have proceeded as far as it has with the associated expenses for both parties.<sup>3</sup>

[23] While it appears that Ms Hergatt remained on the records of HBC as an employee until or on or about 28 May 2012, the reality of the situation is that her employment ceased as an outcome of the meeting in early April 2012 and, most probably, as intended by the email dated 28 March 2012. This is apparent from the fact that Mr Singh was going to be in India for an extended period of time, leaving New Zealand on or about 4 April 2012.<sup>4</sup>

### **Was Ms Hergatt unjustifiably dismissed?**

[24] As with any dismissal, taking an objective view, the test the Authority must apply is whether the decision to terminate the employment of Ms Hergatt on the ground of redundancy was what a fair and reasonable employer could have done in the circumstances.<sup>5</sup>

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<sup>3</sup> However, it is arguable whether Ms Hergatt was entitled to any payment as during the contractual notice period, she was in receipt of accident compensation, and remained so until late May 2012.

<sup>4</sup> As apparent from the email dated 28 March 2012.

<sup>5</sup> Section 103A, Employment Relations Act 2000.

[25] It seems that Ms Hergatt does not challenge the genuineness of the redundancy of her position and on the evidence available to the Authority, I conclude that it is more probable than not that due to the changing circumstances, largely associated with the expansion of the business, the position of Ms Hergatt was no longer required, hence the redundancy was genuine.

[26] It is the manner by which HBC went about terminating the employment of Ms Hergatt that is challenged by her. The Authority is referred to the common law requirements relating to consultation with an employee when redundancy is contemplated. The Authority is also referred to the good faith requirements of s.4(1A)(c) of the Employment Relations Act 2000 (the Act). It is established that HBC failed to adequately provide Ms Hergatt with access to appropriate information relevant to the continuation of her employment, and Ms Hergatt clearly was not given a meaningful opportunity to comment on any of the information before the decision was made to make her position redundant. Although it has to be said that the approach taken by Ms Hergatt did not allow for much discussion.

[27] While Mr Singh suggests that he intended to discuss matters with Ms Hergatt upon meeting with her, I find that it is unlikely that he would have had much to say, given the content of his email of 28 March 2012.

[28] The failure of HBC to comply with the good faith provisions of s.4(1A)(c) of the Act and the absence of any meaningful consultation with Ms Hergatt regarding the redundancy of her position, was not what a fair and reasonable employer could do, given the overall circumstances. I find that the dismissal of Ms Hergatt was unjustifiable: she has a personal grievance.

### **Remedies**

[29] Because Ms Hergatt was unjustifiably dismissed she is entitled to remedies under s.123(1) of the Act. Ms Hergatt does not seek reimbursement of lost wages. This is because she obtained new employment immediately after she obtained a medical clearance from 21 May 2012.

[30] Ms Hergatt seeks an award of compensation pursuant to s.123(1)(c)(i) of the Act for the hurt and humiliation that she says she incurred because of the manner in which her employment was terminated. Ms Hergatt says that the manner in which she was made redundant was “extremely hurtful”. She also refers to the failure of Mr

Singh to consult with her regarding the disestablishment of her position and his failure to inquire about how she was recovering from her injury. In regard to the latter point, it seems to me that Ms Hergatt also made very little effort to maintain any form of regular personal contact with her employer during her absence of approximately five months, relying instead upon the ACC case manager and the occupational therapist. But in any event, the failure of both parties to maintain regular contact during Ms Hergatt's absence is not a relevant matter to be considered by the Authority when considering an appropriate award of compensation in this matter.

[31] I accept the submission for HBC that the evidence as to the effect upon Ms Hergatt relating to the loss of her position is relatively light. Also Ms Hergatt had been absent for approximately five months and she was most probably aware that her employment was tenuous, due to the established fact that the business was going through a period of change.

[32] Taking into account all of the circumstances, including Ms Hergatt's relatively short length of service, I conclude that an award of compensation in the sum of \$3,000 is appropriate. Pursuant to s.123(1)(c)(i) of the Act, HBC Design Limited is ordered to pay to Ms Hergatt the sum of \$3,000.00.

[33] In observing s.124 of the Act, I conclude that there is no ground for reducing this sum as I do not find that there was any real contribution by Ms Hergatt to the circumstances that brought about the personal grievance.

### **Costs**

[34] Costs are reserved. The parties are invited to resolve this issue if they can, taking into account the daily tariff approach of the Authority and that the investigation meeting took the better part of a day. In the event that a resolution regarding costs cannot be reached, the applicant has 28 days from the date of this determination to file and serve submissions with the respondent having a further 14 days to respond.

**K J Anderson**  
**Member of the Employment Relations Authority**