**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**CHRISTCHURCH**

CA 171/10
5286758

| | | |
|---|---|---|
| | BETWEEN | SANDRA JAMIESON<br>Applicant |
| | A N D | ROBIN McCARTHY t/a CHRISTCHURCH TOURS GROUP<br>Respondent |

| | |
|---|---|
| Member of Authority: | James Crichton |
| Representatives: | David Beck, Counsel for Applicant<br>Respondent in person |
| Investigation Meeting: | 13 July 2010 at Christchurch |
| Determination: | 1 September 2010 |

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

[1] The applicant (Ms Jamieson) alleges that she was unjustifiably disadvantaged or unjustifiably dismissed by the respondent (Mr McCarthy) when the latter declared her position redundant. It is also alleged that Mr McCarthy breached good faith by failing to adhere to the requirements of s.4 of the Employment Relations Act 2000 (the Act).

[2] Ms Jamieson was employed as a bus driver by Mr McCarthy and that employment was subject to a letter of appointment dated 29 May 2009 which set out the terms and conditions of the employment. The employment commenced on 29 May 2009 after Ms Jamieson had rung around the various bus companies seeking work. She was initially engaged to drive a shuttle service between Christchurch and Methven and she did this for around three months. In the final period of her employment, she operated the airport shuttle between the city and Christchurch airport.

[3] Both of those runs are mentioned specifically in the letter of 29 May 2009. There is reference in the letter to the rate of pay, both for training purposes and once fully trained, but also to the prospect of other runs in the future.

[4] Ms Jamieson says that about halfway through the employment, she asked Mr McCarthy whether her job was secure and he indicated that it was.

[5] Ms Jamieson was adamant that there was no discussion with her about the prospect of redundancy although she was aware that work was very quiet. She knew that her own vehicle was not making much (because there was a daily log kept), and that there were few days that her own vehicle made a profit.

[6] Mr McCarthy maintained that Ms Jamieson knew perfectly well that the business was in trouble as a consequence of the worldwide economic recession and that her contact with other employees of Mr McCarthy would have confirmed that they also were making losses on their runs.

[7] On 12 October 2009, Mr McCarthy wrote to Ms Jamieson advising her of her redundancy. Ms Jamieson's position was that this was the first and only warning that she had of the impending disestablishment of her job.

[8] A personal grievance was raised by letter dated 29 October 2009. The parties were directed to mediation by the Authority but the matter did not resolve there and it proceeded to the Authority in consequence for investigation.

**Issues**

[9] The first issue for consideration is whether the redundancy declared was in fact a genuine one or whether it was simply a sham to enable the business to dismiss Ms Jamieson.

[10] Next, the Authority needs to consider the process of the redundancy and whether that process met Mr McCarthy's legal obligations including his legal obligations under s.4 of the Act.

**Was the redundancy genuine?**

[11] Although the information provided to the Authority about the genuineness of the redundancy is mostly informal, I am satisfied that the genesis for the proposal to

save costs was the downturn in the tourism business in Christchurch last winter. Mr McCarthy's evidence on the point, although discursive, satisfied me that the business was struggling and, in consequence, there was a need to address costs.

[12] Mr Beck, counsel for Ms Jamieson, submits that even after the Court or Tribunal has satisfied itself that the genesis for the potential redundancy is a genuine one, if the process adopted by the employer has no rational basis, then that may call the whole process into question. I agree. The important point here is that Ms Jamieson's position was the only one disestablished. Even that would be sustainable if there had been a wider engagement with all staff (including the staff that remain) but this was a situation where the other staff knew nothing about the proposed redundancy until after the applicant's position had been identified to be disestablished.

[13] The complete absence of a plan or even evidence of a systematic approach to the downturn which I am satisfied the business experienced, calls into question the very genuineness of the redundancy itself. Two other factors are called in aid of this conclusion. The first is the evidence that Mr McCarthy decided on 1 September 2009 to close down the business and prepared letters to staff on that basis but then decided later the same day to *change his mind*. That is extraordinary enough in the context of the present discussion, but then not a month later, on 30 September 2009, Mr McCarthy advertised for additional staff (apparently expecting a seasonal improvement in the business). Then, of course, as I have already noted, less than two weeks after that event, he wrote to Ms Jamieson and made her position redundant.

[14] Frankly, there is little process here other than confusion. If Ms Jamieson's position is indeed redundant, then how can the advertisements for new staff two weeks previously possibly be justified when those staff would be doing precisely the tasks that Ms Jamieson's position was to cease doing two weeks after notification of the redundancy on 12 October 2009?

[15] It seems that within the space of six weeks, Mr McCarthy has decided to close the business, on the very same day that decision was made, decided not to close it, then four weeks later decided to advertise for more staff and then, two weeks after that, decided to make one of the existing positions redundant.

[16] Accordingly, I conclude that this redundancy was not genuine at all and that the absence of a rational and measured approach to the downturn (which I have held was genuine enough) really calls into question the whole *raison d'étre* for the declaration of redundancy which affected only one position.

**What about the process?**

[17] Sadly, the process used by Mr McCarthy was also confused and obscure. First, there is no evidence from any of the staff (including Ms Jamieson herself) that there was any proper consultation about the business downturn and the sort of response that the employer might need to make. Indeed, I am satisfied on the evidence that there was no meeting at all between the employer and the employees to discuss what was going on.

[18] Mr McCarthy says this was because it was difficult to get everybody together because of different runs and the like, but I do not accept that evidence. By all accounts, this was neither a busy time of the year nor a profitable time and it would have been possible, if Mr McCarthy chose, to call together the staff and discuss the position openly. I am satisfied he chose not to do that. He says, and I accept, that he had various discussions from time to time with various individual staff members and he claims that other staff members would have overheard those discussions. Ms Jamieson denied that there was ever any such discussion in her presence, and I believed her. She also denied being told about possible redundancies or about the business being closed and again I accept that evidence as truthful. She does remember the word *restructuring* being used but not with any specificity. She was aware that there had been resignations of other staff who were not always replaced, and that Mr McCarthy had sold one of the business vehicles. But this information is all anecdotal and it is not good enough for an employer to require an employee to draw their own conclusions in matters as important as this. The obligations on both parties by s.4 of the Act are clear. Both parties are required to be open and communicative and in relation to the process of disestablishing of a position, the employer is required to adequately consult with the employee.

[19] I am satisfied that a series of anecdotal remarks all half heard, together with bits of information about the unsatisfactory financial position of a business do not constitute the full and proper disclosure and consultation required by s.4 of the Act. I

am satisfied that Mr McCarthy had absolutely failed to meet the barest shred of his obligations in this matter.

[20] There ought to have been a consultative meeting between Mr McCarthy and all of his staff at which he disclosed to them the nature and extent of the downturn faced by the business together with his proposals for addressing those concerning trends. He might then have placed that proposal in writing and made it available to the staff but whether or not he did reduce that material to writing, he ought to have then sought submissions from staff on what he was proposing so that he could consider their input before making any final decision. Once those submissions had been considered, he could then have proceeded to form a conclusion as to the best way forward which might be a blend of views he had provisionally advanced together with the views of some staff members, or it might simply have been a conviction that the only way forward involved his original proposal.

[21] Either way, absolutely none of that proper process happened. No other staff member knew that redundancy was in the wind until Ms Jamieson had been identified as the person who would lose her job, and I am satisfied that Ms Jamieson's evidence of the complete lack of consultation is truthful so the first occasion on which she became aware that her job had gone was when she got the letter from Mr McCarthy.

[22] That simply is a completely unacceptable process. Indeed, it would be more accurate to say it was no process at all. It is unfair and unjust because, amongst other things, it does not in any way engage with Ms Jamieson and give her a legitimate and reasonable opportunity to be heard before the axe falls. It also fails entirely to tap into whatever views the other staff members might have about the possible restructuring. There could have been any number of useful suggestions or proposals from other staff members about what might have been possible, but they were not even asked.

[23] In *EDS (New Zealand) v. Shaddox* [2004] 1 ERNZ 497, Chief Judge Goddard refers approvingly to the Canadian Supreme Court decision of *Wallace v. United Grain Growers Ltd* [1997] 3 SCR and cites the following passages from that decision:

> *[98]The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum, I believe that in the course of a dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive. …*

> *[107] The law should be mindful of the acute vulnerability of terminated employees and ensure their protection by encouraging proper conduct and preventing all injurious losses which might flow from acts of bad faith or unfair dealing on dismissal, both tangible and intangible. I note that there may be those who say that this approach imposes an onerous obligation on employers. I would simply respond by saying that I fail to see how it can be onerous to treat people fairly, reasonably, and decently at a time of trauma and despair. In my view the reasonable person would expect such treatment. So should the law.*

I venture the observation that that passage correctly states the law in this country as it is enacted by Section 4 of the Employment Relations Act 2000 although the passage was cited by the Chief Judge as illustrative of the common law duty of good faith, which predated the passage into law of the Employment Relations Amendment Act (No.2) 2004.

**Determination**

[24] In the circumstances of this case, I am satisfied that this was not a genuine redundancy situation at all and that the process by which Ms Jamieson's position was selected for disestablishment was so flawed as to be completely unfair and unjust. It follows that I am satisfied that the redundancy was in truth a sham simply designed to get rid of Ms Jamieson and it follows that the dismissal was substantially and procedurally unfair.

[25] I conclude then that Ms Jamieson was unjustifiably dismissed from her employment because the purported redundancy was in fact a sham.

[26] The question whether Ms Jamieson has contributed in any way to the circumstances giving rise to her personal grievance must, pursuant to s.124 of the Act, be considered. I am satisfied that Ms Jamieson has played no part whatever in the circumstances giving rise to her personal grievance.

[27] To remedy Ms Jamieson's personal grievance and to deal also with the complete failure of Mr McCarthy to fulfil his obligations of good faith under s.4 of the Act, I direct that the following remedies are to be paid to Ms Jamieson by Mr McCarthy:

(a) Compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of $6,000;

(b) A contribution to lost wages in the sum of $2,000 gross;

(c) A penalty of $1,000 to be paid to Ms Jamieson for Mr McCarthy's "deliberate serious and sustained" breaches of s.4 of the Employment Relations Act 2000.

**Costs**

[28] Costs are reserved.

James Crichton
Member of the Employment Relations Authority