

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 121
5297571

BETWEEN ADRIENNE JOAN KNAPP
 Applicant

A N D HIREQUIP LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Stephen Thomas, Advocate for Applicant
 Ralph Webster, Advocate for Respondent

Investigation Meeting 28 October 2010

Submissions Received: 4 November 2010 from Applicant
 4 November 2010 from Respondent

Date of Determination: 10 August 2011

DETERMINATION OF THE AUTHORITY

Preliminary matter

[1] There was an unavoidable delay in issuing this determination because the Authority's building was unable to be accessed for the purposes of recovering files and the member's notes of the evidence until late July 2011 as a result of the 22 February 2011 earthquake. I would like to acknowledge the patience of the parties.

Employment relationship problem

[2] Adrienne Knapp says that her dismissal for reason of redundancy, advised to her on 27 October 2009 with one month's notice paid in lieu and a further two week payment for compensation, was unjustified. Ms Knapp says that her redundancy was not genuine and that there was an ulterior motive for her position being selected and the process adopted was unfair. She seeks reimbursement of lost wages of \$670 gross

per week, \$12,000 for compensation, interest and costs. A penalty was not sought after further information was provided.

[3] Hirequip Limited [Hirequip] says in its statement in reply that Ms Knapp's redundancy was genuine and carried out in a procedurally fair manner.

Issues

[4] The Authority is required to determine:

- Was the redundancy genuine?
- Was the process of consultation, selection and implementation of the redundancy carried out in a fair and reasonable manner and in accordance with good faith obligations?

[5] In assessing justification the Authority is required to have regard to s 103A of the Employment Relations Act 2000 and consider on an objective basis whether the decisions made by Hirequip and the manner of making those decisions were what a fair and reasonable employer would have done in all the circumstances at the time – *Simpson's Farms Ltd v Aberhart* [2006] 1 ERNZ 825.

Process and meetings

[6] Ms Knapp commenced her employment with Hirequip on 24 June 2008. She was employed full time in a customer services position at the Nelson Party & Events branch of Hirequip situated at Stoke. Ms Knapp was party to an individual employment agreement and throughout her employment was paid an hourly rate of \$16.75. The employment agreement provided under clause 23 for redundancy and in clause 23.3 provided that Hirequip would investigate whether retraining or redeployment was possible to avoid termination of the agreement.

[7] At the Stoke premises of Hirequip the machinery and events divisions on site operated as separate divisions for financial purposes. In the events division Ms Knapp undertook a variety of tasks associated with booking and hiring of equipment for events. After June 2009 when another employee left, Ms Knapp's tasks extended to the cleaning and maintenance of equipment.

[8] Ms Knapp refers in her evidence to some concerns she raised about her supervisor's wife claiming more hours on her timesheet than she had worked with the Branch Manager, Martin Talbot-Price, in June 2009. Ms Knapp believes that the raising of the concerns caused problems for Mr Talbot-Price and for her part she felt ostracised for a period from her supervisor. Ms Knapp put this forward because she believed it may have been the reason for her redundancy. Mr Talbot-Price did not accept that this matter had anything to do with the redundancy decision.

[9] The other matter that arose in the events division prior to her redundancy was a capping of employee hours at 40 per week and the dismissal of a full time employee in September 2009. That left two full time employees in the division, Ms Knapp and her supervisor Tony.

Memorandum dated 29 September 2009

[10] On or about 29 September 2009 Ms Knapp and other staff at Hirequip, Stoke were given a memorandum from Antony Smit, the Regional Manager Southern. The memorandum advised that there would be a staff meeting on Thursday, 1 October 2009 at 10.30 am to discuss options that may be considered as a result of Mr Smit's undertaking of a review of branch structure, staffing and hours across the region over the previous month. Mr Smit set out in his memorandum that it appeared to him staff positions and numbers may not be at best practice at the Stoke location. The memorandum mentioned that possible staff redundancies would be discussed amongst other ideas for improving the trading position in Nelson. Staff were advised that they were welcome to bring a support person to the meeting if they wished.

1 October 2009 meeting

[11] At the meeting on 1 October 2009 staff were given a further letter stating that the financial performance of the branch was below expectation and ideas were sought on ways to improve the performance and move toward the best practice from employees. One option in the letter was to consider the number of full time employees required in the branch and redundancy was indicated as a possibility to improve the branch trading performance. Feedback was to be provided over the following seven days by staff or could be left until the next meeting was to be held.

[12] I accept Ms Knapp's evidence that there was no reference to what division any redundancy would come from. I find that more likely because from what was

discussed it seemed matters were still at an early stage, including whether or not there would be a redundancy.

[13] Ms Knapp formed the view because there had been an employee dismissed from her division and that the discussion of poor performance seemed more directed at the other division it was unlikely her position would be vulnerable. She understood from the meeting, and this appears to be confirmed by notes disclosed on behalf of Hirequip (see applicant's document 7), that there was an expectation that each employee would achieve a budget for hire or equipment of \$25,000 per month.

[14] After the meeting Ms Knapp obtained a booking printout about the performance of the events division and what reservations there were for the coming six months.

[15] Ms Knapp also coordinated an email with other staff and she sent submissions to Mr Smit about some ideas for marketing and growing the business. Ms Knapp and other staff were then invited to a further meeting on 19 October 2009 by letter dated 16 October with an agenda as follows:

- a. Discussion of ideas for improving the financial performance of the branch;
- b. Controlling costs to best practice;
- c. Personnel structure; and
- d. Maintaining quality of service.

[16] The reasons for the proposed change were set out as the poor revenue of the branch for the first three months of the financial year, decreased contract numbers and the outlook not forecast to improve. Once again, staff were invited and encouraged to bring a representative or support person to the meeting.

19 October 2009

[17] At the meeting on 19 October 2009 Mr Smit heard feedback and discussion about the various ideas. The Authority did not hear from Mr Smit, but Ms Knapp in her evidence said that she showed Mr Smit her own calculations and reservation list from the events division that indicated she and her supervisor were on target to meet

the \$25,000 per month for each employee. Ms Knapp said that she believed there would be a redundancy but there was no discussion about how that person would be selected and what division that person would come from at that meeting.

27 October 2009

[18] On 27 October 2009 Mr Talbot-Price asked Ms Knapp to attend a meeting in Mr Smit's office. Ms Knapp described this as coming out of the blue. Mr Talbot-Price said he did not suggest Ms Knapp bring a support person to the meeting because she had not brought a support person to the earlier meeting. Mr Talbot-Price moved quickly to advise Ms Knapp that her position had been selected for redundancy. It was common ground that Ms Knapp's reaction was one of shock and dismay with Ms Knapp describing herself as tearful after she received the news. Ms Knapp was handed a letter at the meeting in which it was confirmed her position was redundant and she was given one month's notice. The letter also provided that Ms Knapp was entitled to compensation equal to two week's wages by way of a redundancy payment. There was reference in the letter to the possibility of work for Ms Knapp on a casual or as required basis depending on demand and subsequent workload.

[19] Ms Knapp and Mr Talbot-Price only discussed the possibility of casual work briefly. Mr Talbot-Price was unable to advise how much work there would be and Ms Knapp said that she got the impression it would only be one to two days per week and indicated that that would not be enough for her.

[20] Mr Talbot-Price discussed Ms Knapp having an option of being paid in lieu for her notice period. After working for a few days during the notice period she handed her uniform in and was paid out the balance of her notice period and compensation of two week's wages.

[21] Ms Knapp provided to the Authority a variety of email exchanges about the possibility of casual work after her employment ended. She understood that in order to work for Hirequip she would have to go through the placement agency Coverstaff where Hirequip normally engaged casuals from. After a series of email exchanges Ms Knapp was advised by Coverstaff in an email dated 9 November 2009 that although Coverstaff had mentioned to Hirequip that Ms Knapp was available for work they felt it a little inappropriate to take her back given her redundancy.

[22] Ms Knapp attached that email from Coverstaff to an email to Mr Smit on 25 November 2009. In the email to Mr Smit, Ms Knapp noted that she had been into Hirequip on several occasions and witnessed *temps* from Coverstaff working in customer services (Events). Mr Smit responded to Ms Knapp and advised that he had spoken to Mr Talbot-Price who was more than happy for her to work for Hirequip and was pleased that she was registered with Coverstaff and available to help in the branch.

[23] Ms Knapp emailed the human resource advisor at Hirequip Russell Holland twice on 1 December 2009 and questioned him about some matters. I have placed some weight on these emails and the only response Ms Knapp was able to recall receiving from Mr Holland arrived between the first and second of these emails. The first email Ms Knapp sent at 5.20am to Mr Holland asked him to clarify whether she could be offered any casual work directly because the redundancy letter she had received did not say she had to go through Coverstaff. Mr Holland responded to that email and advised that while Hirequip was legally able to employ directly for reason of ease and administration it was their preference to utilise Coverstaff for casual staff. He suggested Ms Knapp register as soon as possible with the agency and Hirequip would see what work was available. The second email Ms Knapp sent to Mr Holland was at 8.43pm on 1 December and in it she referred to some further issues that remained in her mind about the restructuring summarised as follows; the costs of having two temps to undertake the work Ms Knapp previously did and why she was made redundant when until the end of March both her and Tony the supervisor had made budget or had reservations of \$25,000 per month and it was the heavy machinery part that had not made budget.

[24] Ms Knapp then discovered from discussions with another Hirequip staff member that a woman called Delwyn had been working for Hirequip in the events division and the staff member did not believe that she had been employed through Coverstaff. Ms Knapp was also advised that that person had been performing quite lengthy hours each week. Ms Knapp described herself in her written evidence as feeling quite sick.

[25] Ms Knapp said that she applied for numerous jobs and eventually began part time evening work at a lodge from on or about 10 – 20 December 2009 which work lasted 15 weeks. Ms Knapp said that since that period she had only had three periods

of employment and had been unemployed for two months. Ms Knapp provided a copy of her job leads diary and handwritten applications and enquiries.

[26] A copy of Delwyn's casual employment agreement with Hirequip was provided, together with the letter of offer that was signed by Delwyn on 5 November 2009. Details of Delwyn's pay records reflecting the hours she worked after 5 November 2009 and records to the end of the pay period 2 August 2010 were provided after Mr Thomas requested them during a telephone conference on 28 July 2010 with the Authority and Mr Webster to set the matter down for an investigation meeting.

Genuineness of redundancy

[27] Mr Talbot-Price's evidence was that the financial position of the branch deteriorated and there was a need to constrain costs from escalating and capping of hours. It was decided then that one full time and one part time employee in the events division would not be replaced. Specifically and helpfully, Mr Talbot-Price in his evidence said the decision was made that Ms Knapp's hours could be *cut in half* and there was a need for flexibility in events because whilst the division was always busy over Christmas and summer, it was not so over winter. He denied that the earlier matters involving the other employee and the time keeping about hours had anything to do with the decision to make Ms Knapp's position redundant and I could not be satisfied from the evidence that they were.

[28] I have carefully considered the hours Delwyn worked after Ms Knapp's redundancy. They did vary. Her first week for example saw her undertaking 8.5 hours but she worked during her second and third weeks 25.50 hours and 42.50 hours respectively. The figures provided by Mr Webster that I accept for the first three months of Delwyn's employment showed total hours worked from the week ending 9 November 2009 were 318.50 and the average hours worked each week were 26.54 per week. That is to the end of January 2010.

[29] I have then averaged out the hours worked by Delwyn for the next three months to the end of April 2010. I arrive at a total number of hours worked as 438.15 for those 13 weeks and the average hours worked each week by Delwyn is 33.70 hours, considerably more than the one to two days Ms Knapp thought may be available.

[30] Hirequip in managing its business was able to conclude that the company could manage without a full time employee in the events division and that some flexibility of hours was required to meet varying demand particularly over the winter period. Delwyn's hours were on average over a six month period less than Ms Knapp's 40 hours per week. It has to be said though particularly from February to April 2010 they were not a great deal less. Much was made of Delwyn's higher hourly rate but as explained by Mr Talbot-Smith this took into account holiday pay on a casual basis. Other casuals arranged through Coverstaff also worked at the Events division over that period although they also did before Ms Knapp left and I could not properly conclude from the evidence that the use of those casuals had increased after Ms Knapp's redundancy.

[31] I find therefore that there was a genuine need to review Ms Knapp's hours. Ms Knapp was never offered a position with reduced hours before she was advised her position was redundant. Had such an offer been made as part of consultation undertaken properly and fairly and in good faith then it could have led to Ms Knapp agreeing to part time or flexible hours along the line worked by Delwyn thereby preventing the termination of the agreement. The unfair process prevented the possibility of such an arrangement for reasons I shall go on to explain.

Was the process of consultation, selection and implementation of the redundancy carried out in a fair and reasonable manner and in accordance with good faith obligations?

[32] Good faith obligations under s. 4(1A)(c) of the Employment Relations Act 2000 include an obligation on an employer to provide access to information relevant to the continuation of the employees' employment and an opportunity to comment on the information. These obligations in good faith inform any considerations under s. 103A of the Employment Relations Act 2000. I accept as submitted by Mr Webster that Ms Knapp knew that there was a review of the branch because of the all up staff meetings held with Mr Smit. She knew there was a possibility of redundancies. She did not know before the decision was made to make her position redundant that Hirequip had formed a view Ms Knapp's full time position was not required. She had no opportunity to comment on that. I find that was a breach of Hirequip's obligations for consultation.

[33] Ms Knapp continued after her dismissal to be confused by the budget figures put forward at the earlier consultation meeting of \$25,000 per employee. Her

evidence was that the Events division was on target to meet the budgeted figures. I accept Mr Thomas's submission that if that assessment changed or other factors were considered by Hirequip then in good faith Ms Knapp should have been told about that.

[34] Ms Knapp was given no information to properly consider whether she would be prepared to continue working fewer hours for Hirequip. This failure was in sharp contrast to the written letter of offer and employment agreement provided to Delwyn on 5 November 2009 only days after the meeting with Ms Knapp on 27 October 2009 when she was advised her position was redundant. Although Ms Knapp was offered the opportunity of casual work, it was only after her position was made redundant. This was in breach of the provisions of her employment agreement that required consideration of any redeployment options to try to prevent termination of employment. The Employment Court in *Jinkinson v Oceania Gold (NZ) Ltd* [2010] NZ EmpC 102, although a case concerning redeployment to another position, contained the following statement amongst others that I find is also relevant to this matter in para.38:

In this case, a critical step in deciding to dismiss Ms Jinkinson was the decision that she not be appointed to one of the mine technician positions. Put another way, had Ms Jinkinson been appointed to one of the mine technician positions, she would not have been dismissed. Thus, the selection process and its outcome must form part of the employer's conduct to be reviewed in deciding whether the dismissal was justified.

[35] When objectively assessed the actions of Hirequip, up to and including the decision to dismiss, in failing to offer Ms Knapp the work that would still remain in the Events division before dismissing her for reason of redundancy was not what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

[36] Mr Webster relied on Ms Knapp's refusal of casual work after her position was redundant. He submits in reliance on that refusal, Hirequip engaged Delwyn. Ms Knapp was clearly distressed at being advised of her redundancy and in no position to properly understand or indeed sensibly consider any offer at the meeting on 27 October 2009 after that time. Her understanding was that any work would only be a day or two per week. She had no representative or support person with her and was, unlike the earlier meeting, given no advance notice of what the meeting was about. Any offer of work should have been made before Ms Knapp was advised her position was redundant.

[37] After the employment ended Hirequip were less than open with Ms Knapp about how she could work on a casual basis with the company and why she could not be employed directly. Mr Holland's email of 1 December 2009 about engaging staff from Coverstaff has to be considered in circumstances where Delwyn had been engaged directly with Hireuip and was undertaking her work in the Events division.

[38] For the reasons set out above I find that Ms Knapp's dismissal was unjustified and she has a personal grievance that she was unjustifiably dismissed from her employment with Hirequip. She is entitled to remedies. I consider in this case that as well as compensation there should also be some reimbursement of lost wages based on the hours that were clearly available to be worked in the Events division and were worked by Delwyn.

Remedies

Contribution and allegation of after discovered misconduct

[39] I do not find that Ms Knapp in any way contributed to the situation that gave rise to her dismissal. There was in this case an allegation of after-discovered misconduct. The Court of Appeal in *Salt v Fell* [2008] NZCA 128, [2008] ERNZ 155 held that whilst the subsequently discovered information in that case could not be taken into account as contributing behaviour because it was not known of at the time of dismissal it could and should have been taken into account when determining wage reimbursement and humiliation compensation.

[40] Mr Talbot-Price said that because he became aware after Ms Knapp left that she had agreed to supply a local hotel on the weekend of 4 December 2009 with a marquee on a contra basis that a table would be reserved for Hirequip staff and that they would be provided with free food and drink. Mr Talbot-Price said that when asked about such a deal earlier with Ms Knapp he had told her that it was not appropriate. The contra deal did not go ahead after Mr Talbot-Price became involved because the Hotel did not want to pay the usual hire rate and Mr Talbot-Price said that the landlady was unhappy and said she would have to talk to Ms Knapp as her bar tab had been included in the arrangement.

[41] Ms Knapp said that a bar tab of \$250 was funded by the social club and that the social club usually had a small marquee for June horse races but they never eventuated and the social club was credited for the Christmas function. She said such

contra deals were not uncommon. Ms Knapp said that she had just left the matter for Tony the supervisor to deal with after her redundancy and she had no further input into the matter. Mr Talbot-Price said that Tony had denied any knowledge of the contra deal.

[42] Mr Talbot-Smith would have, if Ms Knapp had continued working, wanted to talk to her about this matter but I am not satisfied on the basis of the evidence I heard that this was conduct that was not able to be explained or mitigated. I do not find that it should be taken into account in assessing remedies and I therefore do not do so.

Lost Wages

[43] I am satisfied from the evidence that Ms Knapp attempted to mitigate her lost wages and applied for numerous roles. Ms Knapp is to be reimbursed for six months lost wages from 27 October 2009 based on the hours over that period that Delwyn worked and calculated at the hourly rate that Ms Knapp was receiving at the time of her dismissal of \$16.75. The total hours worked by Delwyn over that period was 756.65 hours which multiplied by \$16.75 is \$12,673.88 gross. From that sum the notice paid to Ms Knapp of one month is to be deducted together with the two weeks additional payment by way of compensation and the money Ms Knapp received after that time. The Authority has figures provided from Inland Revenue for earnings to 28 February 2010 in the respective sums of \$4,441 and \$787. Ms Knapp should obtain further confirmation of any income details from Inland Revenue to the end of April 2010. I reserve leave for either party to come back to the Authority if a figure cannot be agreed on. I do not conclude that interest should be payable on the amount.

Compensation

[44] I accept that Ms Knapp suffered humiliation and loss of dignity because of the process adopted by Hirequip that led to a lack of understanding about why she had been selected and these feelings were exacerbated on learning that another person had been employed directly in a casual role in the Events division and was undertaking more hours than she understood at the time of her dismissal would have been available. She was treated badly and not in an open and good faith manner. This I find cause considerable distress to her. This is also supported by the emails sent to Hirequip after the termination of employment. I am of the view that a suitable award in these circumstances is \$8,500.

[45] I order Hirequip Limited to pay to Adrienne Knapp the sum of \$8,500 without deduction by way of compensation under s.123 (1)(c)(i) of the Employment Relations Act 2000.

Costs

[46] I reserve the issue of costs. Mr Thomas has until 31 August 2011 to lodge and serve submissions as to costs and Mr Webster has until 14 September 2011 to lodge and serve any response.

Helen Doyle
Member of the Employment Relations Authority