Determination Number: WA 133/06

File Number: 5030767

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE

BETWEEN	Normanna Langman (applicant)
AND	Ludowici Packaging Limited (respondent)
REPRESENTATIVES	Megan Williams for the applicant Elizabeth Brown for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Napier, 21 September 2006
SUBMISSIONS RECEIVED	28 September, and 5 & 10 October 2006
DATE OF DETERMINATION	10 October 2006

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. Ms Langman says she was procedurally and substantively unjustifiably dismissed and that her redundancy was not genuine. The applicant also claims that the Company acted in breach of her employment agreement – statement of problem received on 7 April 2006. Ms Langman seeks $17,000 compensation for humiliation, etc and costs.

2. The Company says Ms Langman's dismissal was because of a genuine redundancy and denies acting in a procedurally unfair manner or breaching the employment agreement – statement in reply received on 3 May.

3. Mediation did not resolve this employment relationship problem.

4. In a telephone conference on 15 May the parties agreed to, if necessary, a two-day investigation in Napier starting on 21 September. As it happened only one day was required. The parties usefully supplied witness statements and an agreed bundle of documents in advance of the investigation.

5. During the investigation Ms Langman's advocate, Ms Megan Williams, agreed that it was not appropriate to continue to pursue the claim that the Company had acted in breach of clause 35 of the applicant's employment agreement.

6. Efforts to settle the problem during the investigation were unsuccessful.

Background

7. I am satisfied that the following is an accurate summary of key facts and events.

8. The Company is a subsidiary of Ludowici Plastics Limited which, in turn, is a subsidiary of Ludowici Limited, the Australian parent company. The Company manufactures moulded fibre products at its Hastings' branch, including moulded apple trays and egg cartons. Production is subject to unstable variables including weather, the apple season, bird flu threat and the NZ dollar.

9. Ms Langman commenced employment in the Company's Hastings's office as a customer services supervisor in March 2005.

10. According to the Company's general manager, Mr Stephen Kattan, demand for the Company's main product lines has declined in the past two years by over 27.55% (par 7 of his witness statement). He also says that, in 2005, the Company was obliged to take out extra borrowings and cut costs as it only made a marginal

profit. In the second half of that year the Company went from a seven day production week to a five day operation.

11. Mr Kattan says he was asked by the Company's board in February 2005 to review the significant under budget performance of its New Zealand operations. In April 2005 he closed the Hamilton engineering division. In the following month he says he introduced an upgraded computer system so as to contribute to the turning around of the Company: a consequence of the new system was the streamlining of operations and the elimination of a lot of administrative work.

12. In or around June 2005 the Company put its Hastings site up for sale. Renovations and upgrades were undertaken in an unsuccessful attempt to sell the property, but also to meet compliance requirements.

13. Mr Kattan says that, in November 2005, the board of the Australian parent company assessed the respondent's losses in the previous financial year together with forecasts for the up and coming year. The Hamilton and Hastings branches were identified as in need of immediate attention with the possibility of restructuring: on 7 November the Hamilton branch was closed and 16 people made redundant (pars 23-25 inclusive).

14. On 29 November 2005, and because of his board's directives, Mr Kattan says he directed his Hastings managers – Mr Chandler and Ms Johnson – to meet with the applicant to advise her of the possibility of a restructure in that office. He says he asked his managers to ask Ms Langman for her views and ideas for the future, with a view to restoring the Company's overall viability.

15. Mr Chandler and Ms Johnson met with the applicant and her advocate, Ms Megan Williams, on Friday 2 December 2005. Ms Langman says it was not until Ms Williams contacted the Company that she was informed as to the purpose of the meeting *("to discuss staffing levels in the Sales/Administration Areas"* – doc. 200 in the agreed bundle).

16. The parties have very different records of that meeting. Ms Langman says she was told she was to be made redundant (par 25 of her statement). Ms Johnson

agreed she used the word *"redundancy"* but says she did so by mistake, at the start of the meeting, but corrected herself and said she meant to say *"restructuring"* (par 30 of her statement).

17. It is agreed that discussion included reference to an existing vacancy and that Ms Langman was invited to apply for it: the applicant said it was very similar to her own and she was not happy having to apply for it. The applicant confirmed during the investigation her belief that she should not have had to apply for the vacancy, but that it should have been offered to her if her existing position was being made redundant. As it happens, at the time of the investigation, the position remained vacant: Mr Kattan says this is because of the restructuring he carried out, and that no appointment to it will be made unless he is persuaded by the relevant manager of the value of filing the position.

18. The parties do agree that, at the meeting, Ms Williams suggested the Company should look at an exit package for the applicant (par 13 of her statement).

19. A further meeting was held on Monday 5 December. The applicant repeated her view that the matter had been predetermined, that she did not understand why she had to apply for the vacancy and that it was her wish the Company consider a departure package. A proposal was emailed to the Company that day by Ms Williams (doc. 118). As Mr Chandler's note of the meeting records, the applicant was also *"happy to go to mediation"* (doc. 115).

20. By email dated 8 December from Ms Johnson, Mr Chandler effectively rejected the applicant's departure package proposal by advising instead that, due to the restructuring of the administration department, Ms Langman's position was redundant and – under the terms of her employment agreement – 6-weeks' notice of termination was given. And, *"to enhance Normanna's employment opportunities it has been decided to offer a finish date as of Friday 9th December 2005, with 6 weeks payable to her in lieu of notice … . All payment will be direct credited on the night of Friday the 9th November … . We would like to thank Normanna for her efforts and wish her well in the future."* (doc. 122).

21. Ms Langman was finished up on 9 December and paid out all monies owing to her. A grievance was filed on 12 December. The applicant states she was too ill to pursue fresh employment for some time after her termination.

Parties' Positions

Applicant's Argument

22. Ms Langman says she does not accept her position was genuinely redundant because, following the Hamilton redundancies, she had asked – and been reassured – there would be no redundancies in the Hawkes Bay. She had also recently taken on additional, human resource responsibilities as well as having been accepted into the staff superannuation scheme. Furthermore, there was no general meeting to inform staff of a restructuring and that some jobs may be made redundant.

23. Ms Langman had been unhappy with Ms Johnson's conduct in the workplace and had communicated her concerns to other managers, but nothing improved and she felt she was not being listened to.

24. Ms Johnson advised the applicant a week before the redundancy meeting that, *"They used to get along but would never be able to again"* (par 2, submission received 28 September).

25. Ms Langman was the only person made redundant in Hastings whereas, if there were genuine financial concerns, it was reasonable to expect others also to be made redundant.

26. The process followed by the respondent was unfair because the applicant was advised from the outset that her position would be made redundant: Ms Langman's dismissal was predetermined.

27. The process was also unfair because Ms Langman should have been offered the vacant position rather than being required to apply for it.

28. The process was also unfair because of its speed and the fact that a decision to dismiss was arrived at notwithstanding Ms Langman's request for mediation assistance. It was unfair of the respondent to select one part of the proposed exit package (the termination date) while rejecting the rest of the draft settlement.

29. Ms Langman received no opportunity to seek and obtain counselling, to have time off work to pursue other employment possibilities and no reference was provided.

Respondent's Argument

30. The Company says amongst other things that it accepts and understands that redundancy situations arouse high levels of controversy and emotion: this situation was no different and the Company continues to grapple with continuing restructuring and its future.

31. The evidence supports the Company's position that the redundancy was not a sham, but that it was substantively justified and that it – the respondent – did what a fair and reasonable employer would do in the circumstances.

32. It approached the restructuring at all times with an open mind.

33. In the event it breached its procedural fairness obligations to Ms Langman, the Company submits it did so because of actions by the applicant and her representative, which stopped the process. In breach of s. 4 (1A) of the Act, Ms Langman failed to act in good faith toward the Company by closing her mind to the options. By pursuing instead compensation of $17160 Ms Langman effectively stopped the consultation process.

34. The Company's advice to Ms Langman, set out in an email of 8 December (doc. 122) was a *"counter offer"* (pars 22.21 & 22.22 of the respondent's 5 October 2006 closing comments).

35. There were no comparable positions into which Ms Langman could have been redeployed and she chose to close to her mind to any alternatives any way.

36. If the Authority determines there were flaws in the procedure they were not fatal under the circumstances and the Company acted throughout as a fair and reasonable employer would.

37. In the alternative, the applicant induced the respondent to breach its obligations to her and any remedy should reflect Ms Langman's significant contributory fault.

Discussion and Findings

38. The question of whether a dismissal or an action was 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 or action occurred – s. 103A of the Act.

39. At the investigation Ms Langman reiterated her belief that she was dismissed because of a conspiracy involving Ms Johnson and Mr Kattan, because of incompatibility issues between herself and Ms Johnson. At the investigation the applicant accepted, however, that she had no compelling evidence in support of that serious allegation, nor did she have any financial or economic argument with which to counter Mr Kattan's evidence that he terminated her position entirely at the board's behest, in order to make financial savings.

40. In support of the respondent's position, I note also the parent company's consistent behaviour in effecting savings around the time it terminated Ms Langman's position as redundant by not only closing down its related Hamilton-based plastic operations, but in the Company itself halving its Hastings-based management team by not replacing two managers who resigned, reducing its production from seven to five-days per week (and dispensing of 10 seasonal/agency workers as a consequence) and not replacing the position Ms Langman declined to apply for. This is evidence not of a conspiracy but instead of genuine commercial reasons for effecting savings by – amongst other things – making the position occupied by the applicant redundant. I therefore have no difficulty in objectively finding for the respondent's position, that it terminated Ms Langman's position in order to effect legitimate financial savings, consistent with

the redundancy provisions set out in clauses 55-57 inclusive of the applicant's employment agreement.

41. The law is clear as to an employer's right, by way of exercising its commercial judgement, to undertake genuine restructuring and dispense with positions in the implementation of its business strategy: *Aoraki Corporation Ltd* v *McGavin* [1998] ERNZ 601. However, the same judgement makes it clear that the implementation of genuine business decisions does not obviate a parallel requirement for fair process.

42. Because of the absence of fair process in this instance, I am satisfied that Ms Langman was unjustifiably disadvantaged – but not unjustifiably dismissed – by the Company, during the steps leading up to her termination. This is because the process employed by the Company was unnecessarily hurried: Ms Langman first met with the respondent on 2 December 2005, to hear for the first time of its restructuring initiative. A second meeting followed on 5 December. The respondent's decision-maker, Mr Kattan, knew that the first meeting, on 2 December, had not gone well (refer to par 28 of his statement) and that the applicant believed a decision had been predetermined. In response he emailed Ms Johnson and Mr Chandler and directed them to *"… find out Normanna's ideas on how we can resolve this current situation… ."* (par 29, above).

43. The second meeting was no more productive than the first, but it did conclude with a clear proposal by the applicant to progress matters in mediation. It is not clear if that proposal was reported back to Mr Kattan: what is clear is that it was not acted on. Ms Johnson and Mr Chandler reported back to Mr Kattan after the 5 December meeting, advising amongst other things, of Ms Langman's wish for a departure package that included a departure date of 9 December. As it turned out, the departure date was identified not by the applicant but by her advocate, Ms Williams, without the applicant's knowledge.

44. On 6 December it was reported back to the applicant she would be finishing that Friday, 9 December: not surprisingly, Ms Langman was dismayed by the news. Her distress was caused, I find, by her advocate's initiative, and not as a consequence of the respondent's actions.

45. Mr Kattan reached his decision on 8 December. It was conveyed by email from Ms Johnson to the applicant's advocate on the same day. It did not directly address Ms Langman's departure package, but implicitly refused it. It did uplift part of her proposal by advising she would finish the following day, 9 December. A plain reading of that advice makes clear it is not a counter offer, as the Company has described it. That is because, while the email includes the words, *"… it has been decided to offer a finish date as of Friday 9th December …"*, it goes on to say:

> *We would like to thank Normanna for her efforts and wish her well in the future. A reference will be made available and we would appreciate the return of key and/or equipment.*
>
> (doc. 122)

46. I am satisfied, objectively, that Ms Langman properly took the advice of 8 December, not as a counter offer, but as notice of the termination of her employment. That is because of the overall tenor of the communication as well as the absence of a clear invitation to respond.

47. Applying *Aoraki* (above), etc, I am satisfied that a fair and reasonable employer would have, in this situation:

- Expressly advised Ms Langman that her departure package was not acceptable to the Company and that – in the absence of alternate proposals from her – it intended making her position redundant;

- Sought her views to alternatives to her being made redundant, particularly as in this case a likely suitable vacancy was known to the parties;

- In the absence of reasonable alternatives to the applicant being made redundant, explored with Ms Langman how her redundancy might be fairly implemented, including the provision of counselling services, opportunity to find alternative employment, the provision of a reference including confirmation the applicant was being made redundant through no fault of her own; and

- In particular, advised whether her proposal to undertake mediation was acceptable to the Company and if not, why not.

48. The Company has not advanced the argument, or any evidence in support, of compelling financial urgency behind making Ms Langman's position redundant, effective from 9 December. Instead that date was settled on, the Company says, so as to enhance the applicant's re-employment opportunities (doc. 122). It was reasonable for the applicant to have input into how her re-employment opportunities might be best enhanced and, therefore, for discussion to have occurred between the parties on this point, as part of the consultation process.

49. No reason has been advanced by the Company for ignoring Ms Langman's legitimate request to continue their discussion by way of mediation. That is unfortunate because it was, at least, a lost opportunity for the Company to explore, with a third party, its legitimate needs to restructure, that there was nothing predetermined about its position, and that the applicant had every opportunity to have input before it came to a final decision.

50. The Company's failure to undertake mediation is especially significant because, amongst other reasons, its employment agreement with the applicant properly sets out how employment relationship problems are to be resolved including,

> *If the problem is not resolved by discussion, any party may (without undue delay) seek the assistance of the mediation services provided by the Department of Labour.*
>
> *All parties must co-operate in good faith with the mediator in a further effort to resolve the problem.*
>
> (doc. 49)

51. As indicated above, I do not accept that the Company's procedural failures caused Ms Langman to be unjustifiably dismissed. This is because, while a suitable vacancy was identified by the parties at the time of the restructuring, it remains unfilled to this day, because of ongoing financial pressures on the Company.

52. I also reach this conclusion because, from practically the outset of consultation with the applicant, Ms Langman instructed her advocate to pursue, vigorously and consistently, a departure package. The applicant's position thereby severely limited what otherwise might have come out of the consultation between the parties. It was thereby inevitable that both Ms Langman's position and the applicant herself would be made redundant.

53. For the reasons set out above, I am satisfied the Company unjustifiably disadvantaged Ms Langman.

Remedies

54. Ms Langman is not seeking lost earnings, which she any way would not be entitled to because I am satisfied the Company's decision to make her position redundant was substantively justified. The applicant is claiming $17,000 for compensation for humiliation, etc. Much of her evidence in support of that claim was based on her belief of a conspiracy. As I make clear above, there is no evidence that supports that claim. Ms Langman instead is entitled to compensation for humiliation, etc as a result of the effect of the Company's failure to meet its contracted obligation to undertake mediation and the unfair haste in which it made the applicant redundant. Having regard to the evidence presented by the applicant, I am satisfied that compensation of $4,000 properly addresses the impact of those shortcomings on Ms Langman.

Contributory Fault

55. Did the extent of the actions of Ms Langman contribute towards the situation that gave rise to the personal grievance? From the very first meeting Ms Langman and her advocate acted on the basis that there was a conspiracy and a predetermined outcome in respect of the applicant's future. There was and is no evidence to support those views. Cool heads were required but were conspicuously lacking. Instead the applicant almost immediately advanced a claim for a departure package, to take effect from 9 December, while declining to actively explore a vacant alternative. As it happens the Company has still not filled that position, for the same reason it made Ms Langman's position redundant. However, Ms

Langman did ask for mediation which was effectively refused by the Company: I am therefore satisfied that Ms Langman did not contribute to the situation giving rise to her personal grievance.

Determination

56. For the reasons set out above, I am satisfied that the applicant, Normanna Langman, was unjustifiably disadvantaged by the respondent, Ludowici Packaging Limited and direct the latter to pay to Ms Langman the sum of $4,000 compensation for humiliation, etc: s. 123 (1) (c) (i) of the Act applied.

57. At the request of the parties at the conclusion of the investigation, costs are reserved. For their assistance, I note here that costs appear to follow the event, in which case the level of costs awards should be well known to the parties.

Denis Asher
Member of Employment Relations Authority