

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Susan Lewis (Applicant)
AND Therese Sisson trading as Edgeware Law Centre (Respondent)
REPRESENTATIVES David Beck, Counsel for Applicant
Jeff Goldstein, Counsel for Respondent
MEMBER OF AUTHORITY Paul Montgomery
INVESTIGATION MEETING 24 July 2003
25 July 2003
DATE OF DETERMINATION 22 September 2003

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] The applicant Susan Lewis claims that the respondent dismissed and/or disadvantaged her in her employment. Further, the applicant claims that the respondent's conduct in respect to the transfer of agreed client files amounts to a breach of the obligation to act in good faith. Should the Authority find that Ms Lewis has a personal grievance, the applicant seeks payment of lost earnings and compensation.

The background

[2] Ms Lewis began employment as a staff solicitor with the respondent in June 2001. She had previously been in sole practice in North Canterbury, her major emphasis being in family law. The applicant was interviewed by Ms Sisson and was employed at Edgeware Law Centre joining another recently hired, less experienced solicitor at the practice. Ms Lewis says she was told that Edgeware Law Centre had a thriving practice and was very likely to continue to grow. No written employment agreement was signed between the parties.

[3] Ms Lewis says she recalled speaking to Ms Sisson at the interview regarding a moderately serious injury the applicant had sustained some twelve years earlier which had been evaluated professionally and which did not restrict her ability to practice law.

[4] Ms Sisson had been in public practice since 1995 and says that since 1996 she has had the services of various professional accountants available to her. The respondent became concerned about the *financial performance of the firm* and asked her father, an experienced businessman, for assistance. From November 2001 Mr Claude Sisson attended the office for a few days each week.

His role was to do the accounts, help with GST returns and to try and get the outstanding accounts paid. ... He did not do any work involving the Trust Account.

[5] Following Mr Sisson's analysis of the financial situation Ms Sisson met with him and Mr Colin Giles, the applicant's partner, who Ms Sisson says attended as Ms Lewis's representative. This meeting was held in February 2002. Mr Sisson advised those present that there were difficulties with the firm's financial situation and that some restructuring was needed. Ms Sisson says she told Mr Giles that *if the situation did not dramatically improve redundancies may be necessary.*

[6] After this meeting, Ms Sisson met with both the applicant and her staff solicitor colleague to stress the need for maintaining regular billing against the required budgets. Ms Sisson also says she advised all staff of the firm's operational costs and kept them informed about the firm's overdraft situation.

[7] The respondent states in her evidence

In February 2002 I became aware that I would be required to pay a substantial tax bill to the IRD. ...

In March 2002 it became evident that the firm's client base had started to decrease thus compounding the poor financial position. This situation was made worse when I was told in March 2002 that I needed to meet a significant tax bill ... by early April 2002. I was also aware at this time that another substantial tax bill was coming in for the underpayment of the provisional tax for the 2001 financial year.

[8] I add here that there was a small payment relating to ACC premiums and an interest payment for the use of money involved in this second payment.

[9] In late March 2002 the issue of Dr Zelas's medical report on Ms Lewis's head injury came to the fore when Ms Sisson requested a copy from the applicant claiming to be curious about the matter. Ms Lewis saw no need to produce it and despite further attempts by Ms Sisson to persuade her, the applicant did not provide a copy and the matter was let drop.

[10] A staff meeting on 27 June 2002 was convened and a range of matters were discussed many of which have no significant bearing on this determination. At that meeting Ms Sisson stated that she

also talked about the financial viability of the firm. I advised the staff, including the applicant, that I was considering making a staff solicitor's position redundant. I told the staff that there had been a significant reduction in the client base and this had negatively impacted on the financial performance of the firm. I also advised staff that it was highly likely that those receiving the highest income would be affected.

[11] For the sake of the record Ms Leonie Sullivan was hired in March 2002 as practice manager. Ms da Silva, a legal assistant, was hired in April 2002 after the point at which the respondent says she began to be concerned over the firm's financial performance.

[12] The recollections of staff attending the meeting on 27 June 2002 are significantly different from those expressed by Ms Sisson in regard to the seriousness of the financial situation being faced. All say that Ms Sisson spoke of billing and collection needing to be done regularly. All accept that she delivered a message that everyone needed to be aware of the financial pressure on

the practice and to do what each one could to reduce it, but none accepts she was told the position was dire, nor that any staff member was at imminent risk of losing her employment. Diane Reddington summarised her perception of Ms Sisson's comments as *something needed to be done and if it wasn't, reduction of staff could occur further down the road*. I interpret that to mean that no critical urgency was signalled to the staff at the meeting of 27 June.

[13] Mr Claude Sisson who had been assisting the respondent on financial matters became ill in or about early April 2002. The evidence of Roz Burnside is that he withdrew and that Mr David Hampton, the respondent's husband, became more intensely involved in the day to day operation of the practice. Ms Burnside states that

the atmosphere in the office radically changed during May, June and July 2002. At this time, due to ill health Therese's father no longer came into the office but instead Therese's partner David Hampton began to come into the office, often snooping and interfering in matters that were not his concern. ...when Therese was approached about our dissatisfaction she told us to ignore him but [she] seemed unable to stop him interfering in our daily work.

[14] Similar evidence was presented by Ms da Silva. It is apparent that Mr Hampton's advice to Ms Sisson regarding the restructuring of the business influenced her decisions considerably.

[15] On 11 July Ms Lewis attended a meeting with Ms Sisson in the latter's office. There are two quite distinct versions of events. Ms Sisson says she told Ms Lewis on 8 July she wanted to meet her and discuss her job, that she told Ms Lewis the firm's financial performance was poor and that *it did not have the client base to sustain the applicant's position and that I was considering making her position redundant as she was the highest earner and the firm needed to save money*. Further, Ms Sisson says *I did not make the applicant redundant during this meeting*.

[16] Ms Lewis says that on or about 9 July Ms Sullivan told her that Ms Sisson wanted to meet with her. She says *I was asked to sit down and told almost immediately, that the practice could not afford me and she unfortunately had to let me go*. A little further on in her evidence Ms Lewis states *the picture of the firm that I was drawn was more of not being able to financially recognize my expertise by paying me a salary commensurate with my skills ...Ms Sisson concluded the meeting by indicating we needed to meet in a couple of days to arrange my departure*. Ms Lewis says that Ms Sisson told her not to tell anybody else what was happening.

[17] In evidence Mr Giles, Ms Lewis's partner, said that Ms Lewis arrived home after this meeting in a highly agitated state and that it took him *several hours* to calm her down. The evidence of Diane Reddington to whom Ms Lewis said, as she passed upon leaving the 11 July meeting, *I've got my marching orders*, confirms that Ms Sisson had conveyed her decision to dispense with Ms Lewis's services at that meeting.

[18] A meeting between Mr Giles, Ms Lewis and Ms Sisson took place on 16 July which made various arrangements relating to Ms Lewis's departure. Ms Sisson agreed to have a letter prepared advising clients of Ms Lewis's departure and a client list was analysed to determine which clients would be offered the opportunity to go with Ms Lewis. Ms Sisson agreed that Ms Lewis would work through a two week notice period until 26 July and would be paid one month's salary as compensation. Ms Sisson agreed to provide Ms Lewis with a computer for use in her new practice.

The financial situation

[19] The respondent's justification for the applicant's redundancy relies on the financial state of the practice at the time. During the pre-employment interview with Ms Lewis, Ms Sisson advised the applicant that the business was growing and that growth was likely to continue. If one has regard to the net profit before tax figures for the financial years ending 2000, 2001 and 2002 the practice was performing very profitably and at a level that would inspire confidence.

[20] What largely gave rise to the financial "crisis" which on the basis of the bank statements was at the relevant time bordering on insolvency, was the failure to provide for tax obligations for a period which pre-dated Ms Lewis's hiring. This failure led to the respondent having to meet a payment to the Inland Revenue Department of in excess of \$70,000 in April 2002. In spite of the dedicated attention of Mr Claude Sisson in attempting to bring the financial position under control, the weight of the debt impacted on the applicant's employment and Ms Sisson decided to make the position she held redundant.

[21] Regrettably she failed to follow the procedural requirements placed on an employer in such circumstances. Specifically, Ms Sisson failed to advise Ms Lewis that the 11 July meeting was to discuss her redundancy, failed to advise the applicant that she had the right to representation, failed to advise prior to the meeting, the method of selection she had employed and gave Ms Lewis notice, although the period of notice was not defined until the later meeting on 16 July.

The legal principles

[22] It is commonplace law that an employer has the right to reorganise his or her business when faced with serious financial difficulties. That right is however, fettered by the obligation to deal fairly with those whose employment is likely to be affected. The duties to advise employees of the risks to their employment, to consult genuinely, to advise the selection process it is proposed to employ, to allow for employees to submit alternative proposals for consideration before decisions are made and the right to representation are required if an employer is to discharge the obligation of fair and open dealing.

[23] As indicated above Ms Sisson failed Ms Lewis in these essential areas and later, having given undertakings in respect to the computer and the transfer of client files, behaved in a manner which did her little credit and caused Ms Lewis additional distress. Specifically, the transfer of files was delayed on the instructions of Ms Sisson allegedly because Ms Lewis had not arranged indemnity insurance and was the subject of a complaint to the Canterbury District Law Society. Then having agreed to Ms Lewis taking the computer which provided the server to the office system, Ms Sisson accused the applicant of theft. To avoid further rancour Ms Lewis returned the computer and took what was essentially a terminal in its place.

[24] While I heard credible evidence that the respondent's selection of Ms Lewis's role for redundancy might have been tarnished by concerns relating to the applicant's earlier head injury, the burden of debt was such that the practice's survival depended on significant and prompt reduction in overheads. I am confirmed in this view by the respondent declaring Ms Burnside's role redundant some two weeks after Ms Lewis left the Edgware Law Centre.

Determination

[25] Notwithstanding the genuineness of the redundancy, I find that Ms Lewis was unjustifiably dismissed by Ms Sisson and thus has a personal grievance. It follows that the applicant is entitled

to remedies for that grievance.

Remedies

[26] On behalf of his client Mr Beck claimed lost remuneration less Ms Lewis's income from her newly established sole practice. Given that the redundancy was warranted on financial grounds I am unable to award lost remuneration.

[27] The manner in which the applicant was dismissed fell well short of the standard of a reasonable employer acting fairly and caused Ms Lewis significant humiliation. Ms Lewis had been a diligent, productive and competent employee whose experience was relied on by both Ms Sisson and other staff at the Edgeware Law Centre.

[28] The shabby treatment to which she was subjected by the respondent following the notification of her redundancy significantly heightened the negative impact of her dismissal on Ms Lewis.

[29] Pursuant to section 123 (c)(i) I order the respondent to pay Ms Lewis the sum of \$12,000.00. In respect of the failure to give Ms Lewis reasonable notice I order Ms Sisson to pay the applicant one further month's salary in the sum of \$3,416.66.

Costs

[30] I encourage the parties to attempt to resolve the issue of costs between them. If that cannot be achieved Mr Beck is to submit his memorandum to the Authority within 21 days of this determination, serving a copy on Mr Goldstein. Mr Goldstein will file and serve his memorandum in reply on behalf of his client 14 days afterwards.

Paul Montgomery
Member of Employment Relations Authority