

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 174/09  
5128618

BETWEEN	LORRAINE MATSON Applicant
AND	FOURTH GENERATION SOLUTIONS LIMITED First Respondent
AND	ARIE NIMKOVSKY Second Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person  
Arie Nimkovsky for Respondent

Investigation Meeting: 26 May 2009

Determination: 2 June 2009

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**DETERMINATION OF THE AUTHORITY**

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[1] Lorraine Matson seeks orders for payment of notice and redundancy compensation following the termination of her employment as a lunch bar manager. She also seeks (i) compensation for distress arising from how her job ended; (ii) a penalty for what she says was a lack of good faith in how her employer handled the sale of the business in which she worked, and (iii) her costs.

[2] The lunch bar business was owned by Fourth Generation Solutions Limited (FGSL). Arie Nimkovsky, FGSL's sole shareholder and director, registered the company for the purpose of operating that business.

[3] Mr Nimkovsky engaged Ms Matson to work as the manager of the lunch bar in November 2007. A written employment agreement was not agreed before she began work but they discussed a draft agreement prepared by Mr Nimkovsky using a

form available on-line from the Department of Labour. Mr Nimkovsky had provided what he calls the final version to Ms Matson but she had not signed and returned it.

[4] On 15 May 2008 Mr Nimkovsky made an agreement to sell the lunch bar to another business. This occurred while Ms Matson was on leave for what turned out to be around four weeks while she had an operation for cancer and had some time for recovery.

[5] Mr Nimkovsky arranged for the new owner of the lunch bar to employ two other staff who already worked there. Ms Matson was not offered a new job as the new owner intended managing the business himself so did not need a manager.

[6] On 21 May 2008 Mr Nimkovsky rang Ms Matson to tell her about the sale of the business and that no position was available with the new owner. The new owner was to take possession of the lunch bar on 25 June 2008 but Mr Nimkovsky advised Ms Matson that there was “*not much point*” in her returning to work through a notice period. He suggested she seek employment elsewhere. By letter on the same day he confirmed that her position had become “*redundant*”.

[7] Mr Nimkovsky and Ms Matson exchanged emails about whether she had a binding employment agreement and whether she was entitled to notice and redundancy compensation referred to in the written agreement given to her by Mr Nimkovsky. Mr Nimkovsky told her that those clauses did not apply as the sale of the business was a restructuring and governed by another term of the agreement. He told her that his view had been confirmed by the Department of Labour.

[8] Ms Matson, through an employment advocate, raised a personal grievance and lodged an application in the Authority which was referred to mediation. The matter was not resolved there and now requires determination by the Authority.

[9] The issues for determination are:

- (i) Who was the employer of Ms Matson?
- (ii) Was there an employment agreement and what were its terms?
- (iii) Did Ms Matson’s employment come to an end in circumstances of “*restructuring*” or “*redundancy*” as described in the written agreement

prepared by Mr Nimkovsky?

- (iv) Is Ms Matson entitled to redundancy compensation and paid notice?
- (v) Did Mr Nimkovsky act in good faith in relying on alleged confirmation of his interpretation from a Department of Labour helpline and in consulting Ms Matson about the prospective sale of the business?
- (vi) In light of conclusions reached on the foregoing issues, are any remedies required, and if so, what?

### **Who was the employer?**

[10] Ms Matson's termination of employment was confirmed in writing on a letter headed with FGSL's name and signed by Mr Nimkovsky as director. However the written employment agreement prepared by Mr Nimkovsky and offered to Ms Matson stated the "*Employer*" party to be "*Arie Nimkovsky, director of Fourth Generation Solutions Ltd trading as Lunchbar 761*".

[11] Mr Nimkovsky is a director and shareholder of two other companies registered with the Companies Office – one set up as a loss attributing qualifying company (LAQC) and which he says owns two properties and another which is for the purpose of trading in property. He provided copies of his professionally-prepared personal accounts which show FGSL was also an LAQC.

[12] Mr Nimkovsky clearly has a sophisticated understanding of business transactions and limited liability companies. In his evidence he denied any personal liability for actions he said were carried out on behalf of FGSL as its director.

[13] If a party wishes to have the benefit of the limited liability regime – particularly in relation to the enforceability of employment obligations – it needs to get its documentation right. Acting in equity and good conscience I do not think it would be fit for Mr Nimkkovsky to benefit from that regime where he has not got it right.

[14] I find that Mr Nimkovsky entered the employment agreement with Ms Matson in his personal capacity by naming himself as the employer party in the document he prepared. This is not displaced by later reference to his position as a director. Given

his sophisticated appreciation of the distinction, he should have entered FGSL as the employer party if he wished to have any liabilities for Ms Matson's employment resting solely with the company and not himself.

**Was there an employment agreement and what were its terms?**

[15] Mr Nimkovsky initially denied there was any employment agreement between the parties but, in an email to Ms Matson on 29 May 2008, stated he was "*willing to comply with the last version of the contract I have compiled and give (sic) you to sign, to which according to my recollection you have verbally agreed*".

[16] There was plainly an employment agreement from the day in November 2007 when Mr Nimkovsky arranged for Ms Matson to start work as the lunch bar manager. While they took some time to finalise written terms, I accept Mr Nimkovsky's statement made at a time before this matter had escalated to a personal grievance that Ms Matson had agreed to the terms he proposed in a written agreement. From at least that point, if not sooner, an employment agreement existed. Its terms were those in the written agreement.

**Did the employment end by "restructuring", "redundancy" or both?**

[17] The employment agreement prepared by Mr Nimkovsky contained the following clauses based on the Department of Labour's "Employment Agreement Builder", an on-line template of sample clauses:

***Restructuring***

***11.1 Restructuring due to transfer***

*In the event that all or part of the work undertaken by the employee will be affected by the employer entering into an arrangement whereby a new employer will undertake the work currently undertaken by the employee, the employer will meet with the employee, providing information about the proposed arrangement and an opportunity for the employee to comment on the proposal, consider and respond to their comments.*

***11.2 Negotiations with the new employer***

*The employer will negotiate with the new employer, including whether the affected employees will transfer to the new employer on the same terms and conditions [ ... ]*

**11.3 No transfer of employment**

*Where the employee either chooses not to transfer to the new employer, or is not offered employment by the new employer, the employer will allow the employee absence from work on pay to undertake a job search or attend job interviews.*

**Redundancy****12.1 Definition of redundancy**

*Redundancy is a situation where the position of employment of an employee is or will become surplus to the requirements of the Employer's business.*

**12.2 Redundancy process**

*In the event the Employer considers that the Employee's position of employment could be affected by redundancy or could be made redundant, the Employer shall, except in exceptional circumstances, consult with the Employee [...]*

**12.3 Notice of Termination due to redundancy**

*In the event the Employee's employment is to be terminated by reason of redundancy, the Employee shall be provided with 3 weeks notice in writing. This notice is in substitution for and not in addition to the notice set out in the general termination clause.*

**12.4 Redundancy payment**

*In the event the Employee's employment is terminated on the basis of redundancy, the Employee shall be entitled to redundancy compensation in the sum of 2 weeks full salary.*

**Termination****13.1 General termination**

*The Employer may terminate this agreement for cause, by providing three week's notice in writing to the Employee. Likewise the Employee is required to give three week's notice of resignation. The Employer may, at its discretion, pay remuneration in lieu of some or all of this notice period.*

[18] Mr Nimkovsky's evidence was that he considered the restructuring clause and the redundancy clause as alternatives. He says his view was confirmed in a conversation with an information officer at the Department's contact centre.

[19] His interpretation is plainly not correct. The clauses are sequential, not alternatives. Mr Nimkovsky's evidence confirmed that the sale of the lunch bar business was initially a situation that came within the term on restructuring – another employer was to undertake the work then currently done by Ms Matson (or would have done once she returned to work). However no arrangements were made for her employment to transfer to the new owner. That owner, as he was entitled to do, did not offer Ms Matson a job. She remained at that point an employee of Mr

Nimkovsky. At that point the term on redundancy came into effect. Mr Nimkovsky employed a lunch bar manager but had sold the business. Without a lunch bar for her to work in, Ms Matson was to “*become surplus to the requirements of the employer’s business*”. She was then entitled to the three weeks notice of termination and the two weeks redundancy payment provided in her terms of employment.

### **Good faith and consultation obligations**

[20] When Mr Nimkovsky rang Ms Matson on 21 May 2008 to tell her that the business was sold, he knew that possession of the lunch bar did not pass to the new owner until 25 June 2008. Rather than having Ms Matson come in to work out her notice, he told her to look for work elsewhere. Having made that choice, he was obliged to pay her the three weeks notice period to which she was entitled.

[21] Ms Matson’s evidence was that Mr Nimkovsky had told her by telephone a week beforehand that there was a prospect of the business being sold. She knew about the prospect of sale some weeks earlier as Mr Nimkovsky has asked if she wanted to buy the business. He had also made inquiries about the prospect of her transferring her employment to the new owner. On that basis I find that he had met, if only narrowly, minimum statutory obligations of good faith to do with the consultation about the sale of the business and transfers of employment. However he did fail to properly consult her about how the redundancy should be implemented, particularly on the question of whether she could work the three week notice period. His oral evidence was that there was “*no opportunity*” for her to work out that notice. This was plainly untrue due to the period of around one month before the new owners took possession of the lunch bar.

[22] I find that Mr Nimkovsky’s interpretation of the employment agreement did not amount to a lack of good faith such that would warrant a penalty being imposed. I do so because I accept he relied on advice from a Department of Labour officer. At his request the Department had provided Mr Nimkovsky with a digital copy of a sound recording of his conversation with that officer. He provided a copy of the recording to the Authority following the investigation meeting. Ms Matson had heard the recording earlier and the parties agreed that I should listen to it before making this determination.

[23] Having listened to this recording I accept Mr Nimkovsky's evidence that he was provided with an "*unequivocal explanation*" that only the restructuring clause applied to the situation. He twice asked if the redundancy clause also applied and was twice told "*no*". That advice was wrong. It is surprising that a Departmental information officer would give such specific advice and, even if that were permissible, would do so without seeing the relevant agreement and clauses. This appears to have contributed to a wrong being done to Ms Matson and caused her unnecessary distress. However the mistaken interpretation does not excuse Mr Nimkovsky from meeting the obligations that, objectively assessed, he had to Ms Matson.

### **Determination**

[24] Under the terms of her employment agreement Ms Matson was entitled to three weeks paid notice once Mr Nimkovsky decided she should not return to work and a further two weeks pay as redundancy compensation because her position was surplus to the requirements of his business.

[25] Mr Nimkovsky's dismissal of her by telephone on 21 May 2008 was an abrupt, unjustified action as he had not properly consulted her about the prospect of working out her notice or other arrangements about the implementation of the redundancy of her position. Ms Matson has a personal grievance on those grounds and remedies must be considered.

### **Remedies**

[26] Ms Matson was off work when she was made redundant, recovering from her cancer operation. She is presently a sickness beneficiary. She was distressed by how she lost her job and was wrongfully denied her agreed entitlements. While she believes the stress of this situation may have contributed to ongoing health difficulties, she did not provide any independent medical evidence confirming that belief. Compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act) must be modest and limited to humiliation, loss of dignity and injury to feelings arising from the specific personal grievance and not other tribulations of life. In the

particular circumstances of this case, I consider the appropriate award under this heading is the sum of \$3000 as compensation for the distress caused by the abrupt dismissal for redundancy and withholding of her entitlements.

[27] There was no blameworthy conduct by Ms Matson which contributed to the situation giving rise to her grievance. No reduction of remedies awarded is required.

[28] Ms Matson was due to be paid five weeks pay on her termination (as notice and redundancy compensation) almost exactly one year ago. The gross amount is \$4326.90. She is entitled to an award of interest on that amount for 12 months. Taking today's 90-day bill rate plus 2 per cent, the applicable interest rate is 4.68 per cent. The interest due totals \$202.50.

[29] Ms Matson has provided an invoice showing costs of \$1200 for advice from an employment advocate, including some costs relating to mediation. She represented herself in the investigation meeting and costs related to mediation are not recoverable. But she succeeded in her claim and is entitled to a reasonable contribution to the costs of her advocate preparing her claim, representing her in a telephone conference with the Authority and advising her in preparation for the Authority meeting. \$800 is awarded in costs and \$70 in reimbursement of her lodgement fee.

### **Summary of remedies**

[30] Mr Nimkovsky is to pay to Ms Matson within 28 days of the date of this determination the following amounts:

- a. \$4326.90 due to her as pay in lieu of notice and redundancy compensation; and
- b. \$202.50 as interest on that amount; and
- c. \$3000.00 as compensation under s123(1)(c)(i) of the Act; and
- d. \$800 towards her costs in bringing this claim; and
- e. \$70.00 in reimbursement of her lodgement fee.