Determination Number: WA 69/07
File Number: 5079739

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE

BETWEEN	Elizabeth McGregor (applicant)
AND	Mobil Oil New Zealand Limited (respondent)
REPRESENTATIVES	Russell Buchanan for Ms McGregor Jenny Gibbs for Mobil Oil
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Wellington, 5 April 2006
SUBMISSIONS	Received by 24 April 2007
DATE OF DETERMINATION	2 May 2007

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. In her statement of problem filed on 27 February 2007 Ms McGregor said she had been procedurally and substantively unjustifiably dismissed and similarly disadvantaged. She claimed unspecified salary from 1 December 2006 to 31 March 2007 and compensation for humiliation, etc and her legal and medical costs.

2. In its statement in reply received on 9 March Mobil Oil denied the allegations. It asked that the matter be dealt with urgently.

3. Mediation on 18 December 2006 did not resolve this employment relationship problem.

4. The parties agreed to a one-day investigation in Wellington on Friday, 5 April 2007. They usefully provided witness statements and documents in advance. Efforts by the parties during and after the Authority's investigation to settle this matter on their own terms were unsuccessful.

5. During the investigation Ms McGregor amended the remedies she sought: she claimed lost salary from 1 December 2006 until 11 May 2007, i.e. $20,412; compensation sought for humiliation, etc was $15,000; her legal costs would total $11,363 plus GST.

6. During the investigation the parties agreed on a submissions timetable.

Background

7. Ms McGregor commenced employment with Mobil Oil in February 2004 as an accounts receivable dedicated customer professional ("ARDCP"). At the time of her redundancy, on 30 November 2006, the ARDCP team totalled 8, i.e. 3 contractors and 5 employees.

8. During her employment with the respondent Ms McGregor experienced extensive periods of paid sick leave (approximately 21% of her working time).

9. While on sick leave during either August or September 2006, and following on from earlier consultation, Ms McGregor received telephoned confirmation from her manager, Ms Julie Rea, of a proposed restructuring that would see much of its head office operation, including the work undertaken by the applicant and her team, shifting to Bangkok.

10. No actual completion timeline was identified, although an indicative completion timeline of 26 April 2007 (including the applicant's team) was given.

11. In a related general communication, management advised the applicant and other staff that:

> *We will endeavour to advise employees at least two months prior to their redundancy being effective.*

(*"Migration Projects"*, undated communication to staff attached to statement in reply)

12. Ms McGregor says that, in the same telephone call, she was advised her work had been reassigned to 2 other ARDCPs (one an employee; one a contractor), in her team. She also claims that Ms Rea said Ms McGregor's job was gone: Ms Rea denies that claim.

13. Ms McGregor returned to work on 2 October 2006. She met with Ms Rea, and another. The parties dispute the content of that meeting. Following that meeting, Ms McGregor did not go back to her old ARDCP position but instead commenced special projects. The applicant says this was on the basis of assurances she would not be made redundant before other staff and that she would be working up to April 2007: Ms Rea says she gave no such assurances and referred only to indicative dates.

14. An email from Ms Rea to the applicant dated 11 October (document G in the respondent's statement in reply) records the former's understanding of the 2 October meeting: notwithstanding its reference to 'requesting' Ms McGregor to undertake project work, I am satisfied that Mobil Oil's actions – particularly during the telephone call – amounted to a *fait accompli*: failing the return of her normal duties, the applicant was left with little option but to accept the project work assigned to her.

15. A second meeting took place on 24 October: Ms Rea was accompanied by another employee. During that meeting Ms McGregor was advised her redundancy would be effected on 30 November, unless – Mobil Oil says – another position could be found for the applicant.

16. A third meeting followed on 26 October: Ms McGregor was accompanied by her husband. The parties dispute the content of that meeting also. The applicant says her request that she resume her previous ARDCP role was refused.

17. Shortly afterward Ms McGregor saw her medical practitioner and went on sick leave from 27 October until the date of her redundancy: the applicant says the respondent's actions caused her sick leave and her continuing ill health.

18. Efforts by Mobil Oil up to the date of her redundancy to redeploy Ms McGregor were unsuccessful.

Ms McGregor's Position

19. Because of my findings set out below I am satisfied it is unnecessary for me to summarise any other aspects of the applicant's arguments, except to add that Ms McGregor says her

confidence about ongoing employment was reinforced shortly after the 2 October meeting by approval from the respondent for annual leave she proposed to take in January/early February 2007.

Mobil Oil's Position

20. Amongst other things the respondent says the decisions made regarding Ms McGregor's work were made in her best interests and those of the business.

21. Ms McGregor's work was allocated to other ARDCPs in August 2006 to avoid her being overloaded after her recent illness, and because she had an operation coming up, and also to ensure maintenance of customer service.

22. There were equally genuine and legitimate reasons for not re-allocating her account work back to her in October 2006 on her return to the office. These included the ongoing importance of ensuring business continuity, particularly in the context of the migration that was underway, the shortness of her immediate team members' employment and that of the contractors remaining, her recovery from ill-health and a requirement to take on additional workload training work-shadowers (i.e. Bangkok-based employees who would take up the work of the New Zealand head office).

23. Ms Read denies assuring Ms McGregor, during the 2 October meeting, that her job would remain until April 2007 and that she would not be departing early: she agrees she advised of that date but only as an indicative one. Ms Rea also denies saying the applicant would leave at the same time as her team members: each role was to be considered on a case by case basis. She says Ms McGregor raised no objection at the 2 October meeting to taking up the proposed project tasks. At that time projects 1 & 2 were definite, whereas project 3 was being scoped. A later decision to postpone project 3 resulted in Ms McGregor's position being made redundant, after Ms Rea had given consideration to work balance within the ARDCP team.

24. The content of the 2 October meeting was set out in an email to the applicant dated 11 October (document G in the respondent's bundle). Ms Rea explained that, while in her witness statement at par 84, she said Mobil Oil would endeavour to give up to 8 weeks notice of each employees' end date, her email reference to giving employees at least one months notice of their separation date was because of the meaning of the word *'endeavour'*.

Discussion and Findings

25. In *Simpsons Farms Ltd* v *Aberhart* unreported, Colgan CJ, 14 September 2006, AC 52/06, the Chief Judge observed that:

> *Following the new s103A, the Authority or the Court must consider, on an objective basis, whether the decisions made by the employer, and the employer's manner of making those decisions, were what a fair and reasonable employer would have done in all the circumstances at the relevant time. The statutory obligations of good faith dealing and, in particular, those under s4(1A)(c) inform the decision under s103A about how the employer acted. A fair and reasonable employer must, if challenged, be able to establish that he or she or it has complied with the statutory obligations of good faith dealing in s4 including as to consultation because a fair and reasonable employer will comply with the law.*

26. Having regard to that recent decision, and the facts of this case, I am satisfied that the applicant was unjustifiably disadvantaged and thereby unjustifiably dismissed as a result of Mobil Oil's failure to consult with her at the time it elected unilaterally to postpone project 3, which resulted in – effectively at the same time and also unilaterally – the decision to terminate Ms McGregor's position. The termination of the applicant then followed unsuccessful efforts to redeploy Ms McGregor. The failure was a significant breach of s. 4 (1A) (c) (i) of the Act.

27. Ms Rea's evidence is that she was presented with the decision that project 3 would be postponed, and she was therefore obliged to consider the work balance within the ARDCP team. As a result she elected to make Ms McGregor's position redundant. During the Authority's investigation she conceded she reached that decision, and implemented it, without consulting Ms McGregor. I find that that failure was not only in breach of the spirit of Mobile Oil's *"driving objective … to ensure all our employees and contractors are treated with respect and dignity no matter what the future may hold for them"* (undated memorandum by Cameron K. Bower, Lead Country Manager and Retail Sales Manager, to the respondent's employees), but that it was also in breach of its obligation under s. 4 (1A) (c) (i) of the Act to provide the applicant with an opportunity to comment before it reached a decision that had an adverse effect on the continuation of Ms McGregor's employment.

28. The consequence of this failure was immediate for the applicant: she was the first of her team to be made redundant. She was denied an opportunity to have input into a decision that saw the remainder of her team, including a contractor, kept on in employment by Mobil Oil. Some of those team members were still working for the respondent at the time of the Authority's investigation. The failure to consult meant Ms McGregor enjoyed no

effective input into Mobil Oil's decision to make her position, and ultimately herself, redundant.

29. The failure to consult was all the more unfortunate in that it compounded the effect of her employer's unilateral decision (refer to Ms Rea's email of 11 October 2006) to have the applicant undertake project work. The failure to consult meant that Ms McGregor was denied a fair and reasonable opportunity to make representations about the consequences for her of that unilateral decision – a decision that she had nonetheless co-operated with at the time. I note here that, given the extent of Ms McGregor's absence because of illness, it was not unreasonable for Mobil Oil to distribute her work to other team members: what it failed to do was take account of the consequences of that redistribution, when project 3 was cancelled.

30. I am also satisfied that Mobil Oil's termination advice was in breach of its specific undertaking to *"endeavour to advise employees at least two months prior to their redundancy being effective"* (above). The respondent defends its position by the claim that it had no work for the applicant. *"Endeavour"* means to try hard (Concise Oxford Dictionary, 10th Ed.). I find the combined effect of the words *"endeavour"* and *"at least"* means, in this instance, that it is difficult to imagine circumstances in which an employer as large and as resourceful as the respondent would be unable to provide Ms McGregor meaningful employment for an additional month's notice, giving the realities of ongoing work and transfer of the same to Bangkok. The combined effect of these words is that Mobil Oil was under an obligation to provide two months notice unless exceptional circumstances prevented the same, in which case payment in lieu should have been considered.

31. The evidence discloses no reasons to conclude that Mobil Oil set out to deliberately mislead or deceive Ms McGregor.

Remedies

32. During the investigation Ms McGregor claimed six months lost earnings. I cannot accept that claim because her own statement attaches to it a medical certificate dated 13 March 2007 that states the applicant *"has been unable to work, due to her … health, in her chosen profession"*. In the absence of reliable, specialist evidence that Mobil Oil's actions were responsible for Ms McGregor's condition, and as it is clear the applicant has had extensive sick leave for other reasons, I do not accept that it has total liability in respect of her inability to work, and therefore her loss of earnings.

33. However, but for the failure to consult, Ms McGregor would have enjoyed some prospect of ongoing employment, like that of other team members.

34. The applicant properly does not contest the substantive genuiness of the disappearance of her position because of redundancy, but rather when that redundancy should have occurred. Mobil Oil's communication to staff, including to Ms McGregor, makes clear no certainty existed as to ongoing employment, and that the timelines put forward were indicative only. What Ms McGregor lost was what her team members enjoyed: longer but not indefinite employment.

35. The uncontested evidence is that the restructuring would be by way of a series of waves. It is therefore not certain that – had a fair process been adopted by Mobil Oil – the applicant would have survived, like her colleagues. Taking account of those uncertainties, and as Mobil Oil contracted to provide the applicant with two months notice, not the one month she received, and the fact that team members (including a contractor) were still employed by the respondent at the date of the investigation, I am satisfied Ms McGregor should receive compensation of three months lost salary, inclusive of the additional one month's notice: s. 123 (1) (b) of the Act applied.

36. Ms McGregor was, and remains, clearly distressed by the termination of her employment. A degree of reality is, however, required. This is because the applicant was on notice from early 2006 of the possible termination of her employment. It was subsequently, fairly and reasonably, confirmed that Ms McGregor's work, along with that of her team, would be migrating to Bangkok, the only uncertainty being when.

37. Ms McGregor has advanced the serious allegation that her current health problem is directly attributable to the respondent's actions. Without serious, independent specialist medical evidence to support that claim I do not accept the applicant's argument.

38. Ms McGregor's stance also overlooks the positive discretion applied to her by Mobil Oil during her employment with the respondent, in respect of its 'unlimited' sick leave provisions: these provisions in fact are not unlimited, but the applicant enjoyed their generous application for 21% of her working time with the respondent. It is appropriate to have regard, in a very broad sense, to that discretion in determining the extent of humiliation and hurt caused the applicant by the respondent's failures in respect of making Ms McGregor redundant.

39. Having regard to the applicant's evidence and the above, I am satisfied that a compensation award of $8,000 is appropriate: s. 123 (1) (c) (i) of the Act applied.

Contributory Fault

40. There is no evidence of any action by Ms McGregor contributing to the situation that gave rise to her personal grievance.

Determination

41. For the reasons set out above I am satisfied that Mobil Oil New Zealand Limited unjustifiably disadvantaged and thereby unjustifiably dismissed Ms Susan McGregor. I therefore direct the respondent to pay the following monies to the applicant:

    a. Three months remuneration. Leave is reserved to the parties to return this matter to the Authority if agreement cannot be reached on the sum); and

    b. Compensation for humiliation, etc of $8,000 (eight thousand dollars).

42. Costs are reserved.

Denis Asher
Member of Employment Relations Authority