

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 155/10
5166673

BETWEEN JANE JOYCE McKENDRY
Applicant
AND JANINE JANSEN and COLIN
PROUTING
Respondents

Member of Authority: Philip Cheyne
Representatives: Bob Gillanders, Representative for Applicant
Jay Lovely, Counsel for Respondent
Investigation Meeting: 15 April 2010 at Dunedin
Determination: 3 August 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Jane McKendry worked at *Janine Jansen I Want it Now! Cut and Colour* in Dunedin from about December 2008 until the employment relationship ended in early May 2009. In her statement of problem, Ms McKendry describes her problem as *constructive dismissal* and seeks compensation for loss of maternity leave and reimbursement of three months' lost remuneration. The statement of problem includes a copy of a letter dated 17 April 2009 to her employer that refers to her having been given three weeks' notice of redundancy on 15 April. The letter lists nine issues for resolution arising from the termination of the employment. In summary, these issues relate to her selection for redundancy, the lack of information and consultation, the lack of training during the employment and inadequate support over an earlier workplace accident.

[2] In its statement in reply, the employer says that Ms McKendry was not constructively dismissed and that no grievance was adequately raised by her. It is also said that there are no grounds for leave to raise a late grievance, issue is taken with Ms McKendry's account of events and a company is given as the correct respondent.

[3] To resolve this employment relationship problem, I should first determine the correct identity of the respondent before turning to the limitation point in the statement in reply. That will involve some consideration of the sequence of events. If a grievance is found to be properly before the Authority I will deal with that; and if not I will consider the issue of leave.

The respondent's identity

[4] The Dunedin business in which Ms McKendry worked is known as *Janine Jansen I Want it Now! Cut and Colour*. That is the name of the respondent given in the statement of problem. In the statement in reply, the respondent's name is given as *Tall Poppy 2008 Ltd t/a Janine Jansen CutNColour*. A company called *Tall Poppy (2008) Ltd* was incorporated in April 2008. The shareholders and directors are Janine Jansen and Colin Prouting, both of whom gave evidence during the investigation meeting to the effect that this company owns and operates the Dunedin business which was earlier owned by themselves as a partnership. I accept that evidence, but it does not resolve the point.

[5] It is a requirement for the employer to be correctly identified as part of an employment agreement. There is a comprehensive written employment agreement signed by Mr Prouting and Ms McKendry dated 2 December 2008. It identifies the employer as *Janine Jansen and Colin Prouting* in several clauses. It is common ground that there was no other employment agreement with Ms McKendry. While Ms Jansen and Mr Prouting may have rearranged their Dunedin business so it is owned by a company, nothing was done to seek Ms McKendry's agreement for a change of employer. The law does not permit a party to an employment agreement to assign that contract. It follows that the proper respondent must be the employer as identified in the agreement, *Janine Jansen and Colin Prouting*.

Raising a grievance

[6] It is common ground that there was a meeting between Ms McKendry, Ms Jansen and the Dunedin shop manager (Belinda Allison) on 15 April 2009. In evidence, there is a handwritten letter as follows:

*Janine Jansen
I Want it Now! Cut and Colour
C/- 378 George Street
Dunedin*

To Jane

I hereby regretfully issue you with 3 weeks notice of redundancy effective from today (15th April 2009).

*Yours sincerely,
Janine Jansen*

[7] Counsel submits that this letter was never given to Ms McKendry during the employment. In support of this submission, counsel sent me the original of the letter from his file. I am left to infer that the letter was never given to Ms McKendry. However, the evidence indicates that the letter was given to Ms McKendry. Ms Jansen's evidence is that she does not recall giving the letter to her during their meeting but she cannot dispute doing so. There is a contemporaneous note of the meeting signed by both Ms Jansen and Ms Allison as correct that says:

Gave Jane the notification of redundancy and we agreed for Jane to come in in the morning as usual and give us her decision on what she wanted to do for the redundancy payment and let us know about the one day option as she was understandably upset at the time.

[8] The evidence for Ms McKendry also goes against counsel's submission. Her evidence is that during the meeting she was issued with a notice of redundancy giving her three weeks' notice. Ms McKendry also wrote a letter dated 17 April 2009 to Ms Jansen and Ms Allison in which she indicates that she was given formal notice:

I am writing re: our meeting on Wednesday 15th April in which I was given 3 weeks notice of my redundancy. I have a few issues regarding the termination of my employment

[9] Assessing all this evidence, I find that it is more likely than not that Ms Jansen gave either a copy of or the original of the handwritten letter to Ms McKendry during their 15 April meeting.

[10] It is common ground that Ms McKendry did not attend work on 16 April. On 17 April Ms McKendry delivered her letter of that date to Ms Allison. It reads:

17/04/09

Dear Janine/Belinda,

I am writing re: our meeting on Wednesday 15th April in which I was given 3 weeks notice of my redundancy. I have a few issues regarding the termination of my employment, and am requesting a mediation meeting on Friday 24th of April at 9am which I hope you both can attend, along with myself and my support person, and a mediator from the Labour Department.

After getting advice, the issues I will be raising:

1. *Clause 12.5 – No prior notice given of possible termination.*
2. *No significant information given.*
3. *No consultation on the reasoning.*
4. *No training given as promised prior to employment.*
5. *As to why I'm being made redundant when you employed three others after my start date.*
6. *Was told you didn't need two juniors when in fact I was employed as a colourist. I am neither a junior nor an apprentice.*
7. *Why I've been made redundant when the Stylists in fact are now doing colour work instead of solely cutting which was my job, as discussed prior to starting.*
8. *Not following up on ACC case manager's advice.*
9. *Being sent home with no pay, because you couldn't provide light duties.*

(The injury I sustained whilst working at your salon).

My entitlement to claim maternity leave depends on my working for the next eight weeks. I feel that it is unreasonable that I have been given three weeks notice.

I also feel that it was inappropriate to contact other salons asking, I quote "have you any room for a pregnant apprentice"? I can't comprehend why that would be done, I do not understand how this would enable me to gain employment, I would expect it to have the opposite effect. I hope we can come to some resolution on these issues.

*Kind regards,
Jane McKendry*

[11] On 21 April, there was a telephone discussion between Ms McKendry and Ms Jansen to follow up on some points discussed during their 15 April meeting. After the phone call Ms Jansen arranged for the Dunedin manager to give Ms McKendry a letter following on from their phone discussion. That letter confirms the arrangement for Ms McKendry to work out her three weeks' notice of redundancy. Ms McKendry's employment then ended in accordance with the notice given her by her employer.

[12] If Ms McKendry wanted to raise a personal grievance, she had to raise her grievance with her employer within 90 days of the date of the relevant action occurring. In their statement in reply, the respondents say that the 17 April letter was insufficient to effectively raise a grievance because no remedies are sought, there is no identification of the problem, no proposal to resolve it and no facts to support it. I am referred to *Creedy v. Commissioner of Police* [2006] ERNZ 517. In that case, the Employment Court held that the legislative purpose of the s.114 requirement to raise a grievance is to enable the employer to remedy the grievance rapidly and as near as possible to the point of its origin. That requires sufficient detail of the complaint to enable the employer to address it. In *Creedy*, no details about the grievance were given other than the bald assertion that there existed a particular type of grievance.

[13] Viewed objectively, Ms McKendry's 17 April letter made the respondents aware of her dissatisfaction about having been given notice of redundancy without prior notice, without information or consultation and about her selection for redundancy ahead of others. Ms McKendry sought resolution of these and other issues at mediation, the primary problem-solving mechanism under the Employment Relations Act 2000. There is no requirement for an employee to use the words *personal grievance* or to identify the type of grievance by reference to the definitions in the Employment Relations Act 2000. Nor is there any need to particularise remedies such as compensation or reinstatement. As to identifying the facts, Ms McKendry more than adequately asserts a number of facts which, if established by evidence, would give rise to the existence of a personal grievance.

[14] Accordingly, I reject the respondents' position that no grievance was raised in time and find that Ms McKendry's letter of 17 April 2009 raised her grievance about the unjustified termination of her employment.

Type of grievance

[15] Before, during and following the investigation meeting, counsel submitted that there was no constructive dismissal and that Ms McKendry should not be permitted to make out any other type of grievance. The submission is partly a point about pleading since Ms McKendry's statement of problem always described her problem as a constructive dismissal and partly an assertion that the respondents would be prejudiced since they had defended the matter as a constructive dismissal rather than an actual dismissal. A point was made about Ms McKendry's brief statement of evidence compared with the respondents' more fulsome statements in compliance with directions in advance of the investigation meeting.

[16] I do not accept counsel's submissions. Ms McKendry's statement of problem included the 17 April letter and an additional statement. The statement says (in part):

On the 15th of April I was taken into the office and told I was being made redundant because there was no work. There was no consultation and no opportunity for a support person. I was offered part time work, however, I believe I should have kept my job because I was a colourist and I was displaced by a junior.

...

I am unhappy about losing my job, but what really hurts is that if I had been kept on for another eight weeks I would have been entitled to maternity leave of \$6,016 – paid by the government.

...

Two days after being told of impending redundancy I gave management a letter outlining why I was unhappy (enclosed). They did not respond at all.

...

[17] From this, it is clear that Ms McKendry's complaint in front of the Authority is that her employer terminated her employment. Perhaps confusion or lack of knowledge has led her to call it a *constructive dismissal* but the substance of the complaint was plain for the respondent to see from the outset. I note that the respondents proffered evidence and made submissions in order to prove justification for her redundancy dismissal in the usual way. I note also that at the beginning of the investigation meeting it was pointed out that the provisions of the Act permit the Authority to find a grievance of a type other than the one alleged.

[18] For these reasons, I do not accept that there has been any prejudice to the respondents. Ms McKendry is entitled to have her grievance considered on the merits.

More about what happened

[19] In her 17 April 2009 letter, her statement of problem and her evidence, Ms McKendry referred to some issues about injury resulting from a workplace accident for which she received cover under the ACC legislation. In short, Ms McKendry injured her neck about a month after starting this employment. She was off work for a time then it was agreed between the employer, ACC and Ms McKendry that she would resume work on a limited hours basis. Later still, Ms McKendry requested an increase in her work hours which was partly accommodated. At the time of the dismissal, Ms McKendry was working about three days per week.

[20] Ms McKendry says that the respondents ignored ACC recommendations about improving the ergonomics of her working environment. She is also critical of the respondents for not agreeing to provide light duties. However, Ms Jansen's evidence, which I accept, is that there were no light duties available for Ms McKendry. There is a further difficulty for Ms McKendry in raising a complaint about her employers' alleged failure to follow ACC recommendations. Section 317 of the Accident Compensation Act 2001 prohibits a person suing for damages arising directly or indirectly out of personal injury covered by the scheme. A personal grievance claim is an exception to this rule but the Authority cannot award any compensation for personal injury covered by the scheme. As I perceive Ms McKendry's complaint, she is trying to do precisely what the law proscribes. It is not necessary to deal any further with the ACC issues.

[21] Ms Jansen is normally based in Christchurch. To deal with the redundancy situation she travelled to Dunedin and she and Ms Allison met on 14 April to discuss the possibility of redundancy affecting either Ms McKendry or another employee (Lexie). Ms Allison's evidence is that things were slow, they needed to reduce their wages bill, that there was little colouring work for Ms McKendry and Lexie and that *it came down to one of these girls to go*. Ms Jansen's evidence about the genesis of this discussion is to similar effect: *during early 2009, the work had dropped off significantly at our Dunedin store. ... of concern was the fact that we had 2 juniors*

and this was not necessary as our Dunedin store was simply not busy enough to support them. ... We were overstaffed and we did not need 2 juniors/colourists. There is also evidence from Mr Prouting to the effect that they needed to reduce staffing to keep the Dunedin store profitable.

[22] I accept all this evidence to the effect that the respondents needed to reduce their staff numbers and wages costs to reflect trading conditions.

[23] Ms Jansen's evidence is that she spoke to another hairdressing salon operator on 15 April before meeting with Ms McKendry about the redundancy situation. Ms Jansen told the other operator that she was looking for an apprentice position for one of her current employees who was pregnant. That was a reference to Ms McKendry. In evidence, Ms Jansen said that she felt it was more likely to be Ms McKendry who was to be redundant rather than the other employee who was the junior for whom there was work to do. She also said that Lexie was cheaper, that they were more likely to be able to train Lexie to do the limited colouring work and that Lexie gave them more options to consider.

[24] On 15 April, Ms Jansen and Ms Allison met in turn with most if not all of the staff. Ms McKendry was the last person they met with. The order was no accident. Ms McKendry was not given any forewarning about the purpose of this meeting. Ms Jansen told her that business had been quiet and Ms McKendry agreed. Ms Jansen said that there was not enough work for two juniors, that she was sorry but had to make Ms McKendry redundant. There was mention that Ms McKendry's training had not progressed but not solely through her fault. Ms Jansen said that she had approached another salon, had told them that Ms McKendry was pregnant, that the other salon was happy to look at Ms McKendry's CV and that she would provide a reference. Ms McKendry was told that she could take three weeks' pay in lieu of notice or work out the notice period. She was also offered continued work one day a week, extra on-call work and told that she would be *first port of call* if work picked up again. Ms McKendry was given the handwritten notice of dismissal mentioned above. She was also told that she should tell the manager the next morning what she wanted to do about working out the notice period and the offer of one day per week and on-call work. Ms Jansen then left, leaving Ms McKendry and Ms Allison together.

[25] Ms Allison's evidence, which I accept, is that Ms McKendry was understandably upset, although neither she nor Ms Jansen had been horrible about the situation. Ms McKendry's evidence, which I also accept, is that she told Ms Allison that she was financially *screwed* and that she had *a big cry*. Ms Allison comforted Ms McKendry.

[26] Ms McKendry did not work the following day. On 17 April she delivered her letter to Ms Allison who brought it to Ms Jansen's attention. Ms Jansen's evidence is that she did not read the letter but simply sent it on to her lawyer who had been engaged before the meeting on 15 April. Mr Prouting's evidence, which I accept, is that they took this letter as the starting process of a grievance and that they did not want to go to mediation as they did not think they had done anything wrong.

[27] On 21 April, there was a telephone conversation between Ms Jansen and Ms McKendry. After the call, Ms Jansen sent an email to her lawyer effectively as a note of the discussion. I accept it is an accurate account of the telephone discussion as follows:

Hi Jane, I see that you are taking the working out your notice option, thank you we appreciate that. Just to be clear your last day will be Wednesday May 6th. If you decide to work one week and take two in lieu that's fine as well. Remember if you go to interviews or find another job give our name and numbers as we are happy to provide references for you. Belinda will give you written confirmation tomorrow.

[28] Ms Jansen next sent a brief note to Ms Allison confirming these arrangements. Ms Allison asked Ms McKendry to sign the note, which they both did on 22 April 2009.

[29] At some point during the notice period, Ms McKendry did approach the other salon about employment. Ms Jansen received a telephone call from the other salon to confirm that Ms McKendry was the person mentioned in her earlier approach. Ms McKendry started work part time at this other salon from 11 May 2009 where she worked until early August when she stopped work to have her baby.

Justification

[30] Justification for the dismissal must be determined objectively by considering whether the employer's actions and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time.

[31] There are detailed provisions in the employment agreement about redundancy as follows:

12.4 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.

12.5 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 regarding the possibility of redundancy and, before a decision to proceed with redundancy is made, whether there are any alternatives to dismissal (such as redeployment to another role). In the course of this consultation the employer shall provide to the employee sufficient information to enable understanding and meaningful consultation, and shall consider the views of the employee with an open mind before making a decision as to whether to make the employee's position of employment redundant. Nothing in this clause limits the legal rights and obligations of the parties.

12.6 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 **2 weeks** notice in writing. This notice is in substitution for and not in addition to the notice set out in the general termination clause.*

12.7 No redundancy compensation payable

In the event the employee's employment is terminated on the basis of redundancy, the employee shall be entitled to notice of termination of employment as specified in the termination clause, but shall not be entitled to any additional payment, whether by way of redundancy compensation or otherwise.

[32] A fair and reasonable employer would comply with the provisions of the relevant employment agreement, but Ms Jansen and Mr Prouting did not do so. There was no consultation with Ms McKendry prior to Ms Jansen's decision that she should be dismissed for redundancy. Ms Jansen decided before meeting with Ms McKendry on 15 April that Ms McKendry would be made redundant. In her evidence, Ms Jansen said that she thought she was consulting with Ms McKendry by meeting with her on that day. However, what was discussed during their meeting was how to implement the decision, already made by Ms Jansen, to dismiss Ms McKendry.

[33] Because of this predetermination Ms McKendry had no opportunity for her views on several aspects fundamental to Ms Jansen's decision to be considered and

responded to. It has resulted in Ms McKendry believing that she was dismissed because of her pregnancy, the work-related accident and the lack of training. That could have been avoided with adequate information, consultation and open-minded consideration of Ms McKendry's views about the situation before deciding who should be dismissed for redundancy.

[34] Mr Prouting endeavoured to persuade me that the situation facing the business fell within the *except in exceptional circumstances* proviso in clause 12.5. I do not accept this point. Mr Prouting made reference to the worldwide financial turmoil from 2008 that no doubt caused or contributed to the decline in trade experienced by the Dunedin shop. I accept that the financial turmoil was exceptional. However, here, Ms Jansen and Mr Prouting controlled the timing of their decision-making. They could have initiated a process of consultation earlier or deferred a decision briefly to allow compliance with their contractual obligations. They could have but did not comply with their contractual obligations or with the similar statutory requirements. No fair and reasonable employer would breach such an important contractual provision when dismissing an employee.

[35] For that reason, I find that Ms McKendry was unjustifiably dismissed. She has established her personal grievance.

Remedies

[36] There is a claim for compensation to make good the loss of paid parental leave suffered by Ms McKendry. She was not entitled to the statutory payment because she had only worked for the new employer for about three months at the date of delivery. If Ms McKendry had not been dismissed but continued to work for Ms Jansen and Mr Prouting she would have had sufficient service and great enough weekly average working hours to be entitled to the payment. The claim is for the difference between the parental tax credit received by Ms McKendry and what she would have received by way of the parental leave payment.

[37] There are several decisions by the Authority to the effect that the loss of an entitlement to paid parental leave caused by an unjustified dismissal prior to the commencement of the leave cannot be compensated under s.123(1)(c)(ii) of the Act: see *Huntley v Maataa Waka Ki Te Tau Ihu Trust*, unreported, CA74B/08, 22 September 2008 and *Melrose v Weka Group Ltd t/a The Vulcan*, unreported,

AA403/08, 25 November 2008. However, in *Chiu v New Deli & Café Ltd*, unreported, AA394/08, 18 November 2008 the Authority made an award under s.123(1)(c) of the Act to compensate for the loss of paid parental leave caused by an unjustified dismissal and commented that such an award could also be made as damages for breach of the employment contract on common law principles.

[38] This case has not been pursued as a common law claim for damages nor has it been defended on that basis so I will refrain from determining it on those principles without reference back to the parties. There is merit in having a definitive judgment from the Employment Court about whether s.123(1)(c) or s.123(1)(c)(ii) permits an award of compensation to cover the loss of the paid parental leave as occurred in this case. I will reserve determining any entitlement under this claim in the meantime.

[39] There is a claim for lost remuneration to cover a three month period following the termination of Ms McKendry's employment. I have accepted that Ms Jansen and Mr Prouting decided to reduce staffing levels for genuine economic reasons but more must be said about the selection issue. In this context I also note that the employment agreement specifically refers to consultation about alternatives to dismissal. Ms McKendry lost the opportunity to persuade her employer that she should not be selected for redundancy, or that the decision should be deferred until early August 2009 (the expected commencement date of her parental leave) or that she might reduce her permanent hours of work by agreement to a level that still entitled her to paid parental leave. Any of these possibilities would have resulted in the continuation of Ms McKendry's employment through to when she commenced her maternity leave although the last of them would have seen her paid less per week. Ordinarily in a genuine redundancy situation that nonetheless gives rise to a personal grievance it is not permissible to award any compensation for lost remuneration. Here, however, I am satisfied that Ms McKendry's employment might have continued if the respondents had complied with their consultation obligations so I find that her grievance probably has resulted in a loss of remuneration. The respondents are to compensate Ms McKendry for her loss from the end of the notice period until she commenced maternity leave. That is to be calculated by taking her ordinary weekly wages over the four weeks prior to the dismissal, multiplying it by the time period specified and deducting Ms McKendry's earnings from her new employment. Leave is reserved in case of any difficulty with these calculations.

[40] There is no claim for compensation for distress.

Summary

[41] Ms McKendry has a personal grievance of unjustified dismissal.

[42] To remedy this grievance Ms Jansen and Mr Prouting are to compensate Ms McKendry for lost remuneration on the basis explained above.

[43] I reserve the position with respect to reimbursement for lost benefits until I have the opinion of the Employment Court regarding a question of law.

[44] Costs are reserved.

Referral of question of law

[45] Pursuant to s.177 of the Act I will refer to the Employment Court for its opinion a question in the terms annexed to this determination.

Philip Cheyne
Member of the Employment Relations Authority

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REFERRAL OF QUESTION OF LAW TO EMPLOYMENT COURT

[1] Pursuant to s 177 of the Employment Relations Act 2000 the Authority refers a question of law to the Employment Court for its opinion, in the following circumstances.

Material Facts

[2] Jane McKendry was employed by Janine Jansen and Colin Prouting in about December 2008.

[3] Ms Jansen dismissed Ms McKendry by giving her notice of dismissal on 15 April 2009.

[4] Having investigated the circumstances of that dismissal I have found that Ms McKendry was unjustifiably dismissed so she has a personal grievance. A copy of the determination is attached.

[5] At the time of the dismissal Ms McKendry was pregnant and in about August 2009 gave birth to her child.

[6] If Ms McKendry had not been unjustifiably dismissed:

- a. She probably would have continued working for Ms Jansen and Mr Prouting until commencing parental leave in about August 2009 in accordance with her rights under the Parental Leave and Employment Protection Act 1987 (the Act).
- b. She probably would have applied for and received a parental leave payment under Part 7A of the Act.
- c. She probably would not have applied for and would not have received a parental tax credit in respect of her child.

[7] Ms Kendry's loss of entitlement to paid parental leave resulted from her personal grievance.

Question of law

[8] The following question of law arises and is now referred to the Employment Court for its opinion:

Does s.123(1)(c) or s.123(1)(c)(ii) of the Employment Relations Act 2000 permit the Authority to order the respondents to pay compensation to the applicant for the loss of her entitlement to paid parental leave under the Parental Leave and Employment Protection Act 1987.



Philip Cheyne
Member of the Employment Relations Authority

