

**Attention is drawn to the order
prohibiting publication of certain
information in this determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 167/07
5071214

BETWEEN	SIMONE RILLSTONE Applicant
AND	PRODUCT SOURCING INTERNATIONAL 2000 LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	John Hannan, Counsel for Applicant David France, Counsel for Respondent
Investigation Meeting:	23 May at Auckland
Determination:	7 June 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant says she was dismissed for redundancy after not accepting a post doing the same work for a lower salary. She claims the redundancy was neither genuine nor fairly carried out. She seeks lost wages, compensation, a penalty for breach of good faith and costs.

[2] The respondent says the applicant was not made redundant because she had accepted a new position with different job content and lower salary but chose to end her employment. The respondent says it acted in good faith while discussing a proposal for redundancy of the applicant's previous post and intended throughout to keep her as an employee.

The investigation

[3] The matter was not resolved in prior mediation. Witness statements were provided by the applicant and the respondent's two directors, Warren Bird and Jenny Vernon. I was also provided with relevant documents including the applicant's employment agreement, her job description, and copies of emails, letters and some meeting notes. Each witness answered questions from me and counsel during the investigation meeting. Counsel gave oral closing submissions speaking to written synopses.

[4] I declined to interview the applicant's personal partner and a former work colleague who both, through counsel, lodged witness statements the day before the investigation meeting. Understandably Respondent counsel objected to statements lodged well outside an earlier agreed timetable. As advised to counsel in a chambers session before the meeting, I put those statements aside because, having read them, I considered they added little other than echoing the applicant's own direct evidence .

[5] Also dealt with as a preliminary issue was whether the respondent had waived privilege in legal advice from a previous employment law advisor by referring to the content of that advice in the statements of its witnesses. In his witness statement Mr Bird stated:

I was advised that I needed to formally announce to [the applicant] that her position was going to be disestablished and in doing so I needed to notify [the applicant] that she was effectively being made redundant.

... Based on advice I had I understood I was required to disestablish [the applicant]'s position and advertise for the new position.

[6] After hearing from counsel I accepted Mr Hannan's submission that Mr Bird's evidence conveyed the content of advice as having been relied on and with the purpose of having an inference drawn in the respondent's favour and consequently waived privilege in that advice, particularly in this case whether there were issues around whether the respondent had acted in good faith. Mr France, for the respondent, provided copies of three emails from the experienced employment law advisor, whom I need not name but who had provided some advice by telephone and

email to Ms Vernon and Mr Bird at the relevant time. I had no evidence on the content of the telephone advice.

Non-publication order

[7] I confirm here the order I made at the investigation meeting, by consent, that commercially sensitive information on the respondent's budgets and customer accounts, referred to in witness statements and documents in evidence, not be published. This order is made under clause 10 of Schedule 2 of the Employment Relations Act 2000 ("the Act").

The background

[8] The applicant's employment agreement, signed on 31 July 2002, contains an orthodox definition of redundancy as:

... a situation which occurs where employment is terminated by the employer, the termination attributable wholly or mainly to the fact that the position filled by the employee is, or will become, superfluous to the needs of the employer.

[9] It provides for four weeks notice of redundancy but no additional "severance payment". It also included an undertaking that the respondent would:

act as a good employer in respect of the employee, providing fair and proper treatment in all aspects of the employment".

[10] The agreement refers to responsibilities set out in the applicant's job description and states that in addition to those responsibilities, "*the employee shall carry out all reasonable work related requests made by the employer.*"

[11] The applicant began working for the respondent in August 2002 on an annual salary of \$80,000. By October 2004 this had risen to \$92,000 but was then increased to \$120,000 when she told Mr Bird that another company had offered her \$130,000 to go and work for it. Her salary package also included an additional annual clothing allowance of \$5000, a company car, mobile phone and a potential bonus of 10 per cent based on meeting budgeted targets.

[12] Through 2005 and 2006 the respondent experienced a significant decline in revenue from its major accounts, including its accounts with a major retail customer on which the applicant spent virtually all her working time.

[13] Competitive pressures saw many of the respondent's retail customers making direct arrangements with suppliers, particularly in China, rather than dealing through the respondent as what Ms Vernon called "the middle man".

[14] The directors identified a need for the business to find new customers and to concentrate on customers whose orders would provide good margins, rather than the shrinking orders and margins on the accounts of the customer on which the applicant worked. This was discussed with staff, including the applicant, in a day-long strategy meeting in November 2005.

[15] On 27 September 2006 Mr Bird met with the applicant and told her that her position was to be disestablished but indicated that she would continue to be employed by the respondent in a role with a greater emphasis on sales. He told her the new role would have a lower salary but a greater 'incentive component', that is she could earn more in bonuses if she met sales targets.

[16] Two days later Mr Bird gave the applicant a document headed "New Sales position proposal" and stated to be effective "as of 27th November", that is two months from the meeting of 27th September, a period equivalent to the notice period in her employment agreement. It stated that "base salary" would be "90k" and set out a bonus structure ranging from 5 to 30 per cent of base salary based on set sales levels which achieved gross margins at a stated minimum level.

[17] On 3 October Mr Bird met again with the applicant and gave her a letter advising that her position, described as "Account Manager" for a named customer, was to be terminated from 27 November 2006. The letter stated that during the period of notice the respondent would work with the applicant "to assist in any way we can to minimize the impact that this redundancy will have on you". This assistance was stated to be time off for job interviews, providing references and assisting with "preparing a cv".

[18] Along with the letter the applicant was told that formal details of the new sales position, including its job description and salary package, would be provided to her in the next five days.

[19] By email on 16 October the applicant complained that she had not been provided with the details of the new position. An email reply from Mr Bird on 24 October attached a job description and salary package information. Mr Bird's email, in part stated:

I do need to clarify to you that the position you currently hold is being made redundant, not you personally as I explained to you ... [] ... The new position will be advertised in the market and I am more than happy for you to apply for this position should it be of interest to you.

[20] Mr Bird and the applicant met on the afternoon of 26 October for what became a four hour meeting about what future the applicant might have with the company. They spent some time comparing the applicant's present job description and that of the new job, which Mr Bird says the applicant described as "virtually identical". Much of what else was said at the meeting is common ground but there is a sharp dispute on a key point – that is whether or not the applicant agreed during the meeting that she would accept work, in what Mr Bird described as a new sales position, on a salary of \$90,000. Mr Bird says emphatically that she did. The applicant emphatically says she did not.

[21] They do agree that the applicant discussed whether the position should be called a sales representative or a senior merchandiser and that the applicant disputed whether the required level of margin to qualify for bonus payments could be achieved.

[22] Mr Bird says that he said he would not advertise the new position but make some changes to the job description to check with her.

[23] The next day Mr Bird sent the applicant an email saying:

It was good for you and I to chat yesterday. What I would like to do now is just make the small adjustments to the J[ob] D[escription] that we talked about, namely changing the position to "senior merchandiser" and the 24 hours to 48 hours. Then just show you the difference between this role and the previous role. Once you are comfortable with that then let's start moving forward with our strategy. So will tidy that up next week.

Are you OK with all that?

[24] A letter from the applicant's solicitor on 31 October raising a personal grievance let the respondent know that she was not "OK with all that". It indicated that the applicant intended working out her notice until 27 November on the basis of the notification of redundancy given to her in the respondent's letter of 3 October. It alleged the redundancy was a 'sham' as the position for which she would have to apply in order to stay employed was not different from her current position.

[25] By email on 5 November the respondent advised its staff and the representatives of the major retail customer with whom the applicant dealt, that the applicant would be leaving at the end of the month.

[26] By agreement between the parties the applicant finished work on 15 November rather than work out her full notice period but she was paid through to 27 November 2006.

The law

[27] The respondent's decision to make the applicant's position redundant, and how it went about dealing with her about any proposal, decision and consequences of redundancy, are justifiable if its actions were what a fair and reasonable employer would have done in all the circumstances at the time of the decision and dealings around it: s103A of the Act.

[28] The application of s103A to the personal grievances involving redundancy was described in this way in *Simpsons Farms Limited v Aberhart* (unreported, EC Auckland, ARC 13/06, 14 September 2006):

[65] ... 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.

...

[67] ... So long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant is for the employer to make and not for the Authority or the Court, even under s103A.

[29] So the Authority must be satisfied on two general points – whether the business decision to make a position redundant in this case was made genuinely and not for ulterior motives; and whether the respondent act in a fair and open way in carrying out that decision – particularly did it consult properly about the proposal to make her position redundant and otherwise act in a way that was not likely to mislead or deceive her, that is in good faith?

Genuineness

[30] While the Authority does not substitute its view for the business judgement of an employer, the genuineness of any redundancy decision may be impeached if it is not a decision that an employer acting reasonably and in good faith would have reached.¹

[31] An employer must provide an adequate commercial explanation for the course adopted.² The usual rule, subject to any contractual duties, is that an employer justifying the disestablishment of an existing position must show that the work being done by the holder of the position is no longer needed by the employer. The inquiry is not as to whether there is merely a rearrangement or renaming of functions but whether the work to be performed has disappeared. The mix of activities making up the job content may alter but if the work is still there and needs to be done, it cannot be said that the incumbents are redundant. Whether a job is the same with a change of focus or emphasis or is a different position, requiring different work, different skills or a different kind of worker, is a question of fact and degree to be determined on the particular evidence.³ The test developed by the Courts to assist in making this assessment asks the question:⁴

Would a reasonable person, taking into account the nature, terms and conditions of each position and the characteristics of the [worker], consider that there was sufficient difference to break the essential continuity of employment?

¹ *NZ Fasteners Stainless Ltd v Thwaites* [2000] 1 ERNZ 739, 747 (CA)

² *GN Hale*, above, at 851 (CA)

³ *McCulloch v NZ Fire Service Commission* [1998] 3 ERNZ 378, 390-2 (EC)

⁴ *Auckland Regional Council v Sanson* [1999] 2 ERNZ 597, 604 (CA)

Alleged ulterior purpose or mixed motive

[32] A genuine redundancy is determined in relation to the position not the incumbent.⁵ The integrity of a restructuring scheme, even where motivated by genuine operational requirements, may be compromised by its application to particular individuals for reasons other than that their jobs have gone. Where the selection of an employer for redundancy is “tainted by some inappropriate motive” and the redundancy is “masking another and different reason”, the worker will have a valid grievance.⁶

[33] The grievant raising an allegation of an engineered dismissal has the burden of convincing the Authority that the theory has substance.

[34] Where the Authority finds “mixed motives” – such as genuine business reasons but with underlying personality or performance concerns⁷ – the employer bears the burden in justifying a redundancy dismissal of persuading the Authority that the redundancy was both genuine and the predominant motive or reason for dismissal. If the predominant motive was a genuine commercial decision, the dismissal will be justified if carried out in a fair manner. If the predominant motive was for another reason, the dismissal will be unjustified.⁸ An important indicator of whether a redundancy was for genuine commercial reasons is whether the employer can show “a significant paper trail or other solid foundation of evidence demonstrating its consideration of a reorganisation”.⁹

Procedural fairness

[35] A just employer – subject to mutual obligations of confidence, trust and fair dealing and the statutory duty of good faith – will consult on a redundancy proposal and implement any redundancy decision in a fair and sensitive way. Fair treatment may call for counselling, career and financial advice, retraining and related financial

⁵ *NZ Fasteners*, above, at 747

⁶ *Savage v Unlimited Architecture Ltd* [1999] 2 ERNZ 40, 49-50 (EC)

⁷ The example given in *Nelson Aero Club Inc v Palmer* (unreported, EC Wellington, 7 March 2000, WC10A/00, Judge Shaw)

⁸ *Forest Park (NZ) Ltd v Adams* [2000] 2 ERNZ 310, 322 (EC)

⁹ *Rolls v Wellington Gas Co* [1998] 3 ERNZ 116, 123 (EC)

support.¹⁰ This requires more than “going through the motions” and will not justify a course of conduct carried out in a way that bruises rather than reasonably minimises the impact on the employee.¹¹

[36] The good faith obligations of the Act required the respondent to be active and constructive, responsive and communicative in consulting the applicant about changes to the business and proposals which might impact on her, including redundancy: s4, s4(1A) and s4(4). This included providing access to relevant information and an opportunity to comment of the information before the redundancy decision was made: s4(1A)(c).

[37] Inadequate consultation and inadequate exploration of redeployment possibilities may cast doubt on the genuineness of an alleged redundancy.¹² However the genuineness of the redundancy of a position once established cannot be negated by a failure to offer a different position.¹³

Issues

[38] The issues for resolution in this matter include:

- Whether the respondent’s decision on the redundancy of the applicant’s position was made for genuine reasons or an ulterior purpose?
- Whether how the decision was made and discussed with the applicant was what a fair and reasonable employer acting in good faith would have done?
- If the respondent’s actions and how it acted were unjustified, what remedies is the applicant entitled to?

Was the redundancy decision for genuine reasons or an ulterior purpose?

[39] I accept the respondent faced genuine commercial pressures on its business in 2005 and 2006, and the applicant does not dispute this. It was harder to make sales and to maintain margins on the accounts of existing customers. There was a real need

¹⁰ *Aoraki*, above, at 619 and 631 (CA)

¹¹ *Coutts Cars Ltd v Baguley* [2001] 1 ERNZ 660, 673 (CA)

¹² *Aoraki*, above, at 618; *NZ Fasteners Stainless Ltd*, above, at 747

¹³ *NZ Fasteners*, above, at 747

to establish new customers and particularly accounts on which good margins could be maintained.

[40] However that does not necessarily amount to a genuine reason for a redundancy decision. A line-by-line analysis of the job descriptions of the applicant's position as a senior merchandiser and the proposed sales representative position showed the range of work and skills required were largely the existing functions already performed. Several direct references to work with suppliers were removed but a supposedly different and increased emphasis on sales work was already the "primary purpose" in the previous job description. And the evidence of both respondent directors was that they expected the applicant to have increased her sales work with potential new customers in her existing job. As Mr Hannon submitted, any requirement for a change in direction or emphasis on sales was well within the express contractual terms of the applicant's employment agreement. In fact the mix of activities required by the respondent for the supposedly new position was not, I find, sufficiently different to break the essential continuity of employment.

[41] For that reason I am not satisfied that the supposed redundancy decision announced to the applicant on 3 October was genuine. However if I am wrong in that assessment and the redundancy decision were motivated by genuine operational requirements, I turn to the question of whether the decision was nevertheless tainted by some inappropriate motive.

[42] The applicant's allegation is that the respondent was motivated by perceived performance issues and a desire to achieve her agreement to working for a significantly reduced salary.

[43] I am satisfied that the applicant has met the burden of convincing the Authority that this theory has substance on the basis of two aspects of the evidence – firstly, the content of the employment law advice disclosed by the respondent, and secondly, Mr Bird's direct evidence about his frustration with aspects of the applicant's work.

[44] That the respondent considered it was really dealing with performance issues is clear from the first advice email disclosed (25 August 2006) which refers to an

option “*to performance manage the employee to get back to achieving what is required*”. It also suggests the position could be made redundant and replaced with a salary-only position and that this was “*a short process when compared with the performance management option*”. It also suggests that simply having a lower salary “*would make the new role quite different*” – a view I consider inconsistent with the law on assessing whether roles are sufficiently different.¹⁴ The applicant’s employment agreement provided for redundancy where the position was superfluous to the needs of the employer, and that must be taken to refer to the work needing to be done, not solely the salary paid for it.

[45] A further advice email (18 September 2006) refers to the need for “*a clear differentiation between the two jobs*”. More advice by email (22 September 2006) refers to discussions with Mr Bird and says “*the concept appears to be an exercise in reducing the salary*”. It says this will “*cause difficulties*” and again promotes the mechanism of disestablishing the position and creating a new one and mentions the prospect of the incumbent applying for and accepting a new position.

[46] The emphasis on reducing the salary paid to the applicant was also evident in the evidence of Mr Bird and Ms Vernon who were both adamant that they intended throughout the exercise to retain the services of the applicant, if they could.

[47] Given that view, and the motive apparently disclosed in the emails of their employment law adviser, the supposed redundancy decision plainly had another purpose.

[48] Mr Bird and Ms Vernon both, in their evidence, expressed frustration at what they saw as a failure of the applicant to grasp the need to prioritise winning new customers rather than continuing to service the demands of her sole major retail customer. Specific perceived performance issues alleged in Mr Bird’s evidence include:

- The applicant having developed a sales plan but not actually approached new customers; and
- Lost orders following the applicant introducing a new supplier who failed to deliver; and

¹⁴ *Sanson*, above, at 604

- The applicant having a salary fifty per cent higher than another sales representative who had won new customers and was generating higher sales totals than the applicant; and
- The applicant having criticised the company to people outside of it.

[49] There was nothing to suggest that the respondent had attempted to deal with those performance concerns in a proper way. There was no evidence that the respondent ever faced up to the dilemma for the applicant between meeting all commitments to the major retail customer – on which Mr Bird accepted the applicant put in long hours and additional weekend work – and having the time to work in developing new customer accounts. Rather the respondent appears not to have considered this or if it did, saw such an exercise simply too time-consuming compared with other business priorities.

[50] Weighing the evidence available I find that the respondent had mixed motives in making the applicant's position redundant and that dealing with underlying performance concerns by way of achieving a substantial reduction in the salary and commission costs of the salary was the predominant purpose of the supposed redundancy exercise. Accordingly the redundancy decision notified to the applicant on 3 October 2006 was unjustified.

Was the applicant fairly consulted and dealt with in good faith?

[51] Not only was the redundancy decision was unjustified, but aspects of the respondent's actions in discussing its intentions with the applicant were, I find, unfair.

[52] On Mr Bird's own evidence the meetings of 27 and 29 September 2006 did not present the applicant with a proposal for restructuring and invite her response before a decision was made. Instead she was told her present position would end and a new position would be created. However she was not told this was a redundancy. Rather this was announced without warning by way of the 3 October letter. Again it was an edict rather than an opportunity to comment on a proposal. Section 4(4)(c)-(e) of the Act makes it clear that the applicant was entitled to more.

[53] Similarly Mr Bird did not make good on a promise to provide her with details of the proposed new position within five days. Those details were provided 21 days later. There were difficulties in finalising that information because Ms Vernon was away overseas on a business trip but a fair and reasonable employer would have let the employee know the reason for the delay.

[54] Subsequent discussions about whether the applicant would accept the new position – and particularly on a reduced salary – put additional pressure on the applicant because she was told that she would have to compete against others who might reply to an advertisement for the position. She could have expected some priority as a matter of, at least partial, “redeployment” from her supposedly redundant current position. The respondent’s actions were however consistent with an intention to put additional pressure on the applicant to accept a reduced salary.

[55] Faced with a conflict of evidence on whether the applicant accepted the new position during the meeting of 26 October, I prefer the applicant’s evidence that she did not. I do so as a matter of likelihood. She was being asked to accept a \$30,000-lower salary, loss of a generous clothing allowance and a tougher bonus entitlement. Altogether, as the respondent accepts, this would have reduced her annual income by around \$47,000. The evidence is clear that she adamantly maintained throughout that there was no real difference between the requirements of the two positions. Mr Bird’s email of 27 October – on his evidence, supposedly after the applicant had accepted the new position – makes it clear he saw he still had a task to complete in persuading her that real differences existed between the two positions. And that email makes no reference – either directly, or I consider, indirectly – to supposed agreement.

[56] Two years before the applicant had secured a salary increase to \$120,000 after getting an offer of \$130,000 from another potential employer. She had that as a sense of her supposed ‘worth’ in the marketplace. That she was able, subsequently, to secure another position elsewhere with a salary at the same level as that she previously enjoyed with the respondent, confirms that sense and makes it less likely that she would have accepted what she would have regarded as a ‘below market’ salary.

[57] And, if that conclusion is wrong, I would not consider the applicant bound if she had indicated agreement in the meeting of 26 October. Applying the “cooling down” principle accepted in resignation cases, I consider she would be entitled to resile from any supposed agreement made in the meeting. Both she and Mr Bird had several drinks during the course of that lengthy meeting – what she described as “stiff” rum and cokes”. She was throughout unrepresented and was not told at any stage by her employer of her right to seek advice on the supposed redundancy decision or the offer of a new lower-paid position. Her evidence was that she sought that advice on 27 October from her personal partner and her mother, a human resources advisor, and not long after had her solicitors notify her personal grievance to the respondent.

Determination

[58] For the reasons given above I find that the termination of employment on the grounds of redundancy notified to the applicant on 3 October was an unjustified dismissal and the actions of the respondent in purporting to make her position redundant and seek her acceptance of a new position at a lower salary amounted to a failure to act in good faith towards her and an unjustified disadvantage.

Remedies

[59] While I have found that the respondent breached its obligations of good faith to the applicant, I do not consider the breaches in the particular circumstances of this case reached the levels of intention, deliberation and seriousness required for the imposition of the penalty sought by the applicant.

[60] Rather I consider that the applicant’s personal grievance is best resolved solely by the award of remedies under s123 of the Act.

[61] She seeks the reimbursement of wages lost between the expiry of her paid notice on 27 November 2006 and starting her present job on 7 March 2007. This loss is quantified as \$32,307.69 being 14 weeks salary. I accept that but for her unjustified dismissal the applicant would have remained employed by the respondent and earned that amount during those 14 weeks.

[62] She also seeks a prorata payment of her \$5000 clothing allowance and a bonus payment equivalent to 10 per cent of her salary. I accept that she is entitled to a prorata award on the allowance but there is insufficient evidence to establish that she would have got or been due a bonus payment.

[63] The applicant did not earn any other income in the 14 week period claimed but I accept that she took adequate steps by way of job search in an attempt to mitigate her losses in the period before securing new similarly well-paid employment. **Accordingly I award \$32,307.69 for lost wages and a further \$1346.15 for lost clothing allowance under s123(1)(b) of the Act, both amounts less any applicable tax.**

[64] I accept the applicant was upset by the circumstances of the termination of her employment with the respondent. She gave evidence of headaches and provided a chiropractor's written opinion that tension arising from the work circumstances had required additional treatment in the latter months of 2006 for the applicant's existing joint problems.

[65] The applicant's feelings were also hurt by the sudden announcement of her departure to staff and customers with whom she had dealt, without letting her know first that this would happen. She was also shocked by the announcement of her redundancy on 3 October which was something quite different from what Mr Bird led her to believe in discussions on 27 and 29 September.

[66] I accept that the applicant suffered humiliation, loss of dignity and injury to feelings as a result of her employer's actions. After having heard her give evidence in the investigation meeting I observed her to be a resilient and determined person who has relatively quickly put her working life back in order. In the circumstances I consider a modest award of \$5000 is warranted in compensation for the hurt and humiliation suffered. **The respondent is ordered to pay to the applicant the amount of \$5000 (without deduction) in compensation under s123(1)(c)(i) of the Act.**

[67] As required under s124 of the Act I have considered whether any remedies awarded should be reduced because of actions of the employee that contributed to the situation giving rise to the personal grievance. While the respondent may have had some valid concerns regarding how the applicant was carrying out her role, it failed to address those in a proper manner with her. For that reason I cannot say any of those issues contributed in any blameworthy manner to the personal grievance.

[68] Costs are reserved. The parties are encouraged to resolve the matter of costs between them. Counsel are familiar with the Authority's usual tariff-based approach and the relevant principles on its application. If the parties are unable to resolve the matter, the applicant may lodge an application for the Authority to determine the matter. That is to be done within 28 days of the date of this determination. The respondent will then have 14 days to reply to such an application. Unless there are extraordinary circumstances, no application on costs will be considered outside this timeframe.

Robin Arthur

Member of the Employment Relations Authority