Determination Number: AA 208/05
File Number: AEA 1136/04

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Lee Roche (Applicant)
AND	Motorpol Australasia Ltd (Respondent)
REPRESENTATIVES	Clive Bennett for Applicant Don Blyth for Respondent
MEMBER OF AUTHORITY	Alastair Dumbleton
INVESTIGATION MEETING	27 April 2005
DATE OF DETERMINATION	8 June 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The termination of employment of the applicant Ms Lee Roche by the respondent Motorpol Australasia Ltd, was viewed by Ms Roche as a problem which she wished to have resolved by the company.

[2] Mediation was undertaken by the parties but without success and the problem was referred to the Authority for it to investigate and determine.

[3] Three issues are central to the problem and its resolution by the Authority. First, although there is no dispute that Ms Roche was dismissed by Motorpol, the parties have a difference of opinion as to whether in the circumstances the dismissal was justified. Second, there is an issue as to whether Ms Roche was sexually harassed and whether Motorpol can be held accountable in law for the conduct of the harasser who was not an employee of the company. The third issue is whether Motorpol gave Ms Roche an opportunity to seek advice before she entered into an individual employment agreement, as required under s.64 of the Employment Relations Act 2000.

[4] To resolve her problem Ms Roche seeks a determination requiring Motorpol to pay her compensation of $10,000 for distress she suffered, and requiring the company to pay penalties for the sexual harassment and the failure to allow her to seek advice on her employment agreement.

Unjustified dismissal

[5] Ms Roche commenced permanent full time employment as Office and Administration Manager with Motorpol on 15 September 2003. The relationship by all appearances was a harmonious and successful one for both parties until the employment was terminated by Motorpol in May 2004.

[6] On Monday 17 May 2004 while discussing a routine operational matter with Mr Don Blyth the financial controller of Motorpol, Ms Roche was told that her employment was being terminated at the end of one month. This advice was given to her suddenly while she was talking with Mr Blyth in the presence of several others who were meeting with him as shareholders of the company. Ms Roche had gone to see Mr Blyth for one purpose and he had used the occasion for another purpose that was completely unexpected by her; the announcement of her dismissal for redundancy.

[7] The reason given by Mr Blyth to Ms Roche for her dismissal was the restructuring of the company, an action considered to be necessary to reduce costs. It was conceded by Mr Bennett on behalf of Ms Roche that her redundancy followed from a genuine commercial decision that had been made by the employer. Accordingly there were grounds justifying the dismissal and the narrower issue is whether a fair and reasonable procedure was followed in the way it was implemented.

[8] There is no dispute that Ms Roche had not been consulted in any way about the decision to dismiss her before it was made. Mr Blyth said this was deliberate on his part as he did not wish to upset Ms Roche by presenting her dismissal as a proposal and seeking her views on it before deciding what to do. Mr Blyth had witnessed some emotional fragility on the part of Ms Roche following several stressful events in her personal life he became aware of. On one occasion Ms Roche had to be taken from work to hospital after her health was affected by distressing occurrences.

[9] I consider that in the particular circumstances of this case the employer's legal duty of good faith imposed on it a requirement to consult Ms Roche before deciding whether to make her position redundant. There was no emergency situation such as a receivership or insolvency, and consultation would not have been impracticable or futile. Other options to cut costs may have emerged as a result and Mr Blyth knew that Ms Roche had previously offered suggestions about the way this could be achieved.

[10] A letter confirming the dismissal stated that the decision to make Ms Roche's position redundant had been taken, "after options had been reviewed." Clearly they were not reviewed in conjunction with Ms Roche after giving her an opportunity of putting forward options or after providing information to her about the way the position to be made redundant had been selected over another one in administration.

[11] In *Coutts Cars Ltd v Baguley* [2001] ERNZ 660, the Court of Appeal confirmed the correctness under current legislation of earlier law it had stated, when deciding a case under the Employment Contracts Act 1991. This was in respect of the following passage;

> *A just employer, subject to the mutual obligations of trust confidence and fair dealing, will implement the redundancy in a fair and sensitive way.*

[12] As was also confirmed by the Court of Appeal, although consultation is not an absolute requirement in every situation, it is desirable if not essential in most cases. I find that this was not an extreme situation enabling the employer to forgo consultation. By doing exactly that however Motorpol acted unfairly towards Ms Roche, and in the way it chose to announce the dismissal it acted insensitively towards her. I find therefore that the dismissal was unjustified.

Sexual harassment

[13] The alleged harasser (who was not a party or witness before the Authority) was a man with

whom Ms Roche was required to have contact in the course of her work for Motorpol. I accept the evidence of Ms Roche and her husband that she was offended by remarks the harasser made to her at various times and which she regarded as sexually loaded. I accept that she was distressed by the contents of a particular fax she received at work from the harasser in March 2004. Some of its words on their face are capable of bearing a suggestive double meaning. Ms Roche had met the man who had written them and had sensed his motivations.

[14] There is a legal question however as to whether the relationship of the alleged harasser to Motorpol was one that is covered by the personal grievance remedy available under the Act. There is also a related question whether Motorpol could become only liable for the harasser's actions if Ms Roche had complained about them and if the employer had failed to respond by taking adequate steps to prevent any reoccurrence of the harassment.

[15] I find that the alleged harasser was not an employee, director, officer or other agent of Motorpol. He was a trade associate of the company as a supplier of goods, and he was a shareholder and personal friend of Mr Blyth. He was also present when Ms Roche was told of her dismissal by Mr Blyth and I accept that this was regarded by her as an unnecessary invasion of her privacy in a distressing situation.

[16] The alleged harasser was not himself the employer of Ms Roche, even if he had some degree of ownership of Metropol by being a shareholder. Nor was he a "representative" of the employer within the meaning of s.103(2) of the Act, since he was not an employee of Metropol. The only other way that Metropol could become liable for the harasser's actions was if he had been a client or customer and I find that he did have that particular relationship. However further conditions of s.117 of the Act were not satisfied. These required a complaint to be made by Ms Roche to her employer about the harassers conduct. It is only upon the employer in this way gaining an awareness of what has been taking place that it becomes legally responsible for investigating the complaint and taking practicable steps to prevent a repetition of the behaviour.

[17] Ms Roche confirmed in her evidence that while she was employed she did not at any time complain to her employer or to Mr Blyth about the harasser's actions. Even after her dismissal in a letter written about five days later, no mention was made of this. The letter was written by a professional advocate for the purpose of raising a personal grievance on behalf of Ms Roche, but her complaint was only about her dismissal.

[18] Accordingly I find in the circumstances that Metropol has no responsibility for the actions of the alleged harasser that contributed to the employment relationship problem of Ms Roche.

Opportunity to seek advice on employment agreement

[19] I find that Ms Roche was not provided with the opportunity required to be given to new employees under s.64(2)(a) and that accordingly Metropol was in breach of the Act. There was a written agreement between the parties. It was one Ms Roche herself had produced, but not until her first day of employment and even then it remained unsigned for several months after that. The Act is clear; a copy of the intended employment agreement must be provided to a new employee "before" entry into the agreement. Providing it at the same time or immediately after entry is not sufficient compliance with this plain requirement.

[20] Ms Roche was not new to employment with Motorpol when she commenced her permanent job in September 2003, for she had worked as a temporary employee of the company immediately prior to that. Nevertheless I find that she was to be regarded in September 2003 as a "new" employee for the purposes of s.64 of the Act. It is consistent with the Act's objectives that a

"new" employee may be regarded as one who is subject to a new individual employment agreement, even if the employer is not a new to that relationship with the employee. However situations where an existing agreement is varied, extended or renewed, may not fall within s.64.

[21] Nothing turns on this point however because the penalty claim has been brought out of time. The application was lodged in the Authority on 18 November 2004, some 13 months after Ms Roche commenced with Metropol. This was too late, as under s.135(5) penalty claims are to be brought within 12 months of the cause of action arising.

[22] In the circumstances the claim for a penalty for this breach of the Act is not therefore able to be resolved by imposing a penalty against Metropol.

Determination

[23] I find that Ms Roche was unjustifiably dismissed by Motorpol through its failure to consult her and consider any views she might wish to give, before deciding to make her position of employment redundant. In the circumstances a fair and reasonable employer would have sought her input before taking that action.

[24] Ms Roche suffered considerable hurt and distress as a consequence of the abrupt way her dismissal was announced without prior consultation and in front of several others. Mr Blyth was fully aware that Ms Roche had been emotionally unsettled at times during her employment. Although Mr Blyth thought he was being kind to her by not prolonging the decision making, his sudden announcement of the dismissal had the exact opposite effect. Others in Mr Blyth's shoes would reasonably have forseen as much.

[25] The responsibility Motorpol must now bear is not for taking away Mr Roche's job but for the emotional harm she was caused by the way that was done. There was no contributory conduct on the part of Ms Roche. Mr Blyth pointed out to the Authority the absence from work of Ms Roche for most of the notice period for which she was being paid. A medical certificate covered a few days but after that expired Ms Roche did not return. I do not accept that the payment of nearly one month's wages to her in those circumstances ought now to be regarded as compensation already paid for this unjustified dismissal. Her continued absence from work may be regarded as a demonstration by Ms Roche of how badly she was affected by the unfair and unreasonable treatment she received. Her actions flowed from Motorpol's demonstration of its loss of trust and confidence, a feeling which she understandably showed was reciprocated.

[26] I assess the appropriate level of compensation to be $7,500. Motorpol is ordered to pay that amount to Ms Roche under s.123(c)(i) of the Act.

Costs

[27] Ms Roche was legally represented in this investigation and I have been told the level of costs she has incurred. She is entitled to a reasonable contribution to her costs, which I assess to be $1,350. Motorpol is ordered to pay that sum under clause 15 of Schedule 2 of the Act.

A Dumbleton
Member of Employment Relations Authority