

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 102
5363378

BETWEEN CINDY JEANNINE SOO
Applicant
AND AUTOGLAS-STIEGER LEVIN
LIMITED
Respondent

Member of Authority: P R Stapp
Representatives: Russell Ward, for the Applicant
Franz Stieger, for the Respondent
Investigation Meeting: 26 July 2012 at Palmerston North
Determination: 14 September 2012

DETERMINATION OF THE AUTHORITY-(NUMBER TWO)

Employment relationship problem

[1] This employment relationship problem is about Cindy Soo's dismissal on 26 September 2011. I have previously dealt with Ms Soo's claim for unpaid wages and holiday pay ([2012] NZERA Wellington 87). Autoglas-Stieger Levin Limited has relied on redundancy as the reason for terminating Ms Soo's employment.

[2] In her statement of problem lodged in the Authority on 14 November 2011, Cindy Soo claims that there were a number of matters that occurred during and after her employment that includes bullying, harassment, and threats made by a sales manager from the Autoglas Stieger group of companies. She says that during her employment she was asked to inflate invoices for jobs by the sales manager, and she says at the time this offended her morals. She says she took this up at the time with Mr Stieger. He accepted that he had a conversation with her and that the matter was discussed by them both. He denies the allegation of inflating invoices. Ms Soo claims these matters had more to do with the reasons for dismissal than being made redundant.

[3] Autoglas-Stieger Levin Limited denies all Ms Soo's other claims. It says the company is insolvent and no longer trading to justify redundancy.

The issues

[4] Because Ms Soo never put in writing any personal grievances before her statement of problem was lodged in the Authority, her claims need to be clarified. Using the Authority as the first point of contact in raising a personal grievance is entirely unsatisfactory. A personal grievance should ideally be raised with the employer first. It is clear that the primary matter relates to Ms Soo's dismissal and the reasons for it. The secondary claims of alleged bullying, harassment and threats and the use of bad language by the sales manager seem to be part of the background to the events leading up to her dismissal and not grievances on their own. Certainly any matters relating to an allegation of harassment after her employment will have more to do with remedies than being a proper cause of action to base a personal grievance claim on, I hold. Therefore, the issues are:

- What is Ms Soo claiming; and
- Was her dismissal justified?

[5] The statutory test of justification for dismissal is contained in s 103A of the Act. That section was amended with effect from 1 April 2011. Ms Soo's dismissal occurred on 26 September 2011. Her last day at work was 7 October 2011 after working out her notice.

[6] For completeness s 103 A of the Act reads as follows:

103A Test of justification

(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

*(3) In applying the test in subsection (2), the Authority or the court must consider—
(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.

(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—

(a) minor; and

(b) did not result in the employee being treated unfairly.

[7] These revised provisions were considered by the full Court in *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160. I adopt and apply important aspects of the analysis set out in that decision. In doing so, I bear in mind that it is not the role of the Court or the Authority to substitute its view for that of the employer. Rather, it is to assess on an objective basis whether the decision and conduct of the employer fell within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time.

The facts

[8] Ms Soo and another person proposed that the Autoglas Stieger business expand to Levin. Mr Franz Stieger, director, agreed, and Ms Soo and the other person became employees and then shareholders in the business. At first the business operated from a van and then Ms Soo's parents' place in Levin until Mr Stieger's family trust purchased a building in Levin and the business moved in to the premises.

[9] Ms Soo was employed by Autoglas-Stieger Levin Limited (Autoglas Levin) as the accounts/admin manager. She was paid \$18 per hour and worked 40 hours per week. There was an unsigned employment agreement (produced by the respondent upon a direction from the Authority). Ms Soo acknowledged that she had received an agreement, although she says it was not the one produced by the respondent. It seems that the alterations reflected the parties' agreement on the terms. The agreement contains a redundancy provision in the event that Ms Soo's position became surplus to

requirements and that notice under the agreement applied. The employer was not required to pay redundancy compensation.

[10] According to Mr Stieger, the business had financial difficulties and he says he discussed these with Ms Soo and the other employee. He put the difficulties faced by the business to Ms Soo and that he wanted to meet to discuss them with her. He wrote letters (5, 22 and 26 September 2011 produced) setting the arrangement up. He met with Ms Soo on 6 September 2011. A sales manager from the Stieger group of companies also met with Ms Soo on 23 September 2011. This person was placed in the workplace to work closely with Ms Soo and the other employee to try and turn the performance of the branch around. Mr Stieger says that these letters and meetings enabled Ms Soo to have input and to comment on the financial difficulties, the proposal to make her position redundant and the final decision to dismiss her for redundancy. Ms Soo accepts that this occurred, but claims in her statement of evidence that the procedure was unfair and insolvency arrangements have not been properly followed.

[11] Ms Soo was required to work out her two weeks' notice, and she says the contact with her from Autoglas Levin afterwards was harassment and bullying considering that Autoglas Levin had ample time to hand over during the notice period.

[12] Ms Soo claims she was bullied, harassed and threatened by the sales manager. She says the sales manager used offensive language during her employment and before she left and the sales manager treated her badly on her last day at work

[13] Ms Soo says that the matters related to a request by the sales manager for her to inflate invoices for jobs and his reaction when she was not prepared to do what he wanted. She says her refusal to do this was part of the cause for the decision to dismiss her and that the redundancy was not genuine.

[14] The statement of problem and the Authority's investigation meeting was the first time any such matters were raised. Since Mr Stieger was not present at the workplace on the last day and the sales manager did not attend the Authority's investigation meeting I hold that Ms Soo's evidence means that it was more likely than not that she was treated badly by the sales manager involving what she had to do at work and how he spoke to her. Therefore these matters have more to do with the background and any remedies later and cannot represent personal grievances on their

own because they were never properly raised in time. I am supported by the following:

- (a) That none of Ms Soo's emails before she was dismissed referred to any of the matters she now alludes to taking place;
- (b) That Mr Stieger's letters never referred to them being raised at any time before the statement of problem;
- (c) That the statement of problem lacked detail and specificity in regard to any instances with times and dates.
- (d) The matters relating to alleged harassment, bullying, threats and bad language used by the sales manager are doubtfully in time for any personal grievance on their own.

[15] It is more likely than not that the business did cease trading under its name on or about 7 October 2011. Signage at the premises was changed to another name involving the Stieger group after Ms Soo left. Ms Soo was not consulted on options relating to the business continuing to operate under another name in the same premises after her employment ceased.

Determination

[16] A decision based on redundancy is sufficient for an employer to justify dismissal. An employer is allowed to restructure for genuine commercial reasons. Insolvency is not of its own a requirement to establish that a redundancy is not genuine. Ms Soo accepts that she has no issue with the procedure followed by Stieger Levin involving notice of the financial situation (letter) consultation (letter and meeting), and an opportunity for input and comment on the matters raised with her about the financial difficulties and proposed redundancy, before a decision was made, but claims the decision was for ulterior reasons and the redundancy was not genuine.

[17] I am satisfied there was a financial difficulty in the business. I make this finding because:

- (a) Mr Stieger put it in writing to Ms Soo before her dismissal (letters produced) that there were financial difficulties;

- (b) Mr Stieger's financial advisers have referred to it in writing; and
- (c) Ms Soo has not produced evidence to cause me to doubt what Mr Stieger says about injecting funds in to the business and that the branch was not performing.
- (d) Ms Soo did accept that there were some financial difficulties and has referred to them in her statement of problem and written evidence.
- (e) The sales manager was brought in to try and turn the branch's performance around.
- (f) The written documents make it more likely than not that the business ceased trading under the name Autoglas Stieger Levin Limited.

[18] Furthermore there has been a change in the name of the business/company operating from the premises. This means that Ms Soo's employer ceased as it is no longer trading, and it must follow that her position was surplus given the termination of employment. At the barest of thresholds this looks to be because of a commercial reason related to financial difficulties that everyone agrees existed at the time. Also, the other employee is no longer employed there and Ms Soo referred to the sales manager making redundancies in other branches too. However a business of exactly the same sort is still operating from the premises supported by advertisements for work in a local newspaper produced by Ms Soo. She also says that she has seen the premises being used and produced photos taken by her father. This was not challenged by Mr Stieger. He had the opportunity to inspect the advertisements and photos produced by Ms Soo during the Authority's investigation meeting. He confirmed that the name of the business had changed having regard to the signage and the new business belongs to him. Ms Soo thinks that this situation means her dismissal was unjustified. What Mr Stieger has actually done has been to substitute the name of one of his group of companies with Autoglas-Stieger Levin Limited and changed the signage with the business operating from the same premises his trust owns. It does look suspicious, but Ms Soo has not been able to establish that there were ulterior motives that related to her personally and the alleged invoice matter and any issues that she might have had about the sales manager's behaviour during her employment. This is because she was not able to remember any detail and specifics including times and dates and what was actually said.

[19] Mr Stieger has produced evidence of a commercial reason for the change that relates to him putting his own money in to the company (not challenged), and the branch not performing. There is a slender linkage between the commercial rationale that has been provided for the change and Ms Soo's termination from her employment, I hold. Mr Stieger and Ms Soo have both alluded to Stieger Levin making losses in the economic environment to explain the reasons for what has been done and this is supported by the business no longer trading when the other employee also lost his job. I have to accept that the reasoning for the decision was that the financial situation of the Levin branch meant that for economic reasons there was no alternative but redundancy with the business ceasing to trade. Ms Soo's evidence that the insolvency procedures have not been followed by Autoglas Levin is not a requirement that is placed on a business to justify a redundancy dismissal I hold. As such it does not have much weight in this case. The accounts support that there has been financial movement occurring, but Ms Soo has not been able to show that these relate to the company still trading and there being any impact on her previous role.

[20] I am not satisfied that Ms Soo's complaints about the sales manager are enough to prove that Mr Stieger as the decision maker had any ulterior motives in making her redundant given the evidence of the business's performance and the financial difficulties relied upon and based on the company no longer trading. However Mr Stieger failed to give Ms Soo the decision as the decision maker and left it to the sales manager. Ms Soo was entitled to have the decision maker present. Mr Stieger did not attend the final meeting when the decision was given to Ms Soo. If this had been properly done this could be a legitimate arrangement, but in this case has potentially meant that Ms Soo's departure was adversely affected by the sales manager's role. Mr Stieger did not give Ms Soo an opportunity for input on him keeping the business operating under the name of another one of his companies in the same premises. This prevented Ms Soo having the chance to influence any other options. This is not a minor defect because of the significance of requiring a discussion over potential options since the business continued in the name of another of the group's companies.

[21] I hold that Ms Soo has a personal grievance as it related to the procedure and the lost chance to influence any options when the business continued from the same premises but under another name in the same group of companies. In this regard she is entitled to the consideration of remedies. I am satisfied that she attempted to

mitigate her lost wages. I find that she did not contribute to the situation giving rise to her personal grievance. However as the dismissal was for genuine redundancy there can not be any lost wages.

[22] Ms Soo has claimed compensation for hurt humiliation loss of dignity and injury to feelings. This can only apply to the breach by the employer to follow a fair process. Her humiliation of the manner in which the departure from her job occurred involved her role in a continuing project promoting the business the day after her work finished. Also, there have been various accusations made about her performance and things she was accused of doing without any evidence to back them up from Mr Stieger. Also her evidence of the way in which she had to depart because of the actions of the sales manager upset her. I assess her evidence in the sum of \$3,000 for compensation for hurt and humiliation.

Conclusion

[23] The redundancy was genuine. The procedure involved a defect in that Ms Soo was deprived of an opportunity to discuss and have input on information about the business that she learnt about after her employment finished. A fair and reasonable employer could have raised the matter before the decision was conveyed.

[24] Autoglas Stieger Levin Limited is to pay Cindy Soo \$3,000 compensation under s 123 (1) (c) (i) of the Act.

[25] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority