

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 328
5291179

BETWEEN MARGARET SANDERS
AND INGHAM MOTOR
HOLDINGS LIMITED

Member of Authority: Yvonne Oldfield
Representatives: Philip Skelton for Applicant
Carl Blake for Respondent
Investigation meeting and submissions 9, 10 November 2010
Further information provided to Authority 17 November 2010
Further submissions 13 May 2011 for Applicant, 17 May 2011 for Respondent
Determination: 25 July 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mrs Sanders was employed by the respondent (Inghams) from October 2008 when it purchased a vehicle dealership which had been operated by her previous employer, Coutts Cars Limited. Until a restructuring in September 2009 she occupied the role of Business Manager. The primary responsibility of that role was to help organise finance and insurance packages for prospective purchasers of motor vehicles.

[2] The respondent has explained that as part of the restructure the Business Manager position was disestablished along with that of "Vehicle Clerk." One new job (Vehicle, Finance and Insurance Manager) was created to take over the duties of both these roles. The respondent's position is that this had become possible because of the

implementation of a more efficient information management system (the Dealer Management System) an associated move to having sales people take more responsibility for information management (including data entry) and a reduction in double handling of work. The economic downturn also contributed to making it feasible for work which had previously made up two jobs to be managed by one person.

[3] Mrs Sanders and the incumbent Vehicle Clerk both applied for the new position. The other candidate was successful and Mrs Sanders' employment was terminated on notice.

[4] Mrs Sanders does not dispute that a possible restructure was foreshadowed right from the time Inghams took over the dealership. She understands that the restructure affected other employees in different parts of the business, and after hearing all of the evidence at the Authority's investigation meeting, accepts that this resulted in the loss of other jobs besides her own. She accepts that she was consulted about the proposed changes and gave feedback on them. Finally she also accepts that the tasks of the two old roles could be performed by one person, albeit with some support.

[5] Notwithstanding what she has acknowledged, however, she claims that her dismissal for redundancy was neither genuine nor fairly carried out. She says that she should have been appointed to the new role because it was essentially her old job with a different name. She also says that she was not told the selection criteria to be used in making the appointment and that the respondent's assessment of the relative suitability of the candidates for the new role was unreasonable. For this reason she says the decision to appoint the former vehicle clerk was unsustainable.

[6] Mrs Sanders also says that the respondent's decision to offer the job to someone else was motivated by a perceived need to placate Mercedes Benz Financial Services Limited (MBFSL.) It had been her job as Business Manager to liaise with finance providers to assist them to consider, and if appropriate approve, finance for purchasers of the respondent's vehicles. When finance was approved, Inghams received commission on the finance package, and as part of her incentive scheme, a portion of that commission went to the Business Manager. Many of Inghams'

customers obtained finance from MBFSL. That company also provided a finance facility directly to Inghams itself, and had guaranteed the lease of the premises from which the respondent traded. In short, MBFSL was a company with which the respondent had a very close and important relationship.

[7] In April 2009 MBFSL expressed serious dissatisfaction with the quality of information in the finance applications it was getting from Ingham's customers. A formal complaint was lodged alleging that, in the case of some applications, Mrs Sanders had withheld detail which was needed in order for MBFSL to be able to assess the level of risk involved with the applications. MBFSL threatened the respondent with the imposition of significant additional costs if the matter was not rectified to its satisfaction.

[8] Mr Sears instituted disciplinary proceedings and convened a meeting with Mrs Sanders and MBFSL. On the basis of what transpired at that meeting, and on condition that Mrs Sanders be given additional training and supervision, MBFSL decided not to proceed with the threatened sanctions. This was conveyed to Mrs Sanders who agreed to undertake further training. Before the training or any other follow up had occurred, however, the restructuring process intervened, with the result that Mrs Sanders was dismissed. Against this background, she believes the decision to make her redundant was influenced by the fact that she had been subject to a disciplinary process shortly beforehand.

Issues

[9] The respondent disputes all Mrs Sanders' assertions. The issues for determination are therefore:

- i. whether the new role was different from the old;
- ii. what the selection criteria were and whether they were disclosed to Mrs Sanders;
- iii. whether the respondent's decision to appoint the other applicant was sustainable;

- iv. whether the appointment decision was improperly influenced by the perception that Mrs Sanders had damaged an important business relationship, and
- v. whether the termination of Mrs Sanders' employment was fair and reasonable in all the circumstances.

(i) Was the new role different from the old?

[10] Although the job description for the Vehicle, Finance and Insurance Manager role incorporates the content of both the old job descriptions, Mrs Sanders claimed that the new job was primarily concerned with work she had performed as Business Manager.

[11] She based this view partly on her perception of the relative responsibilities of the two original roles. The Vehicle Clerk was essentially an administrative and data entry role without a sales function and was remunerated at a much lower level than the Business Manager role. Since closing a deal on a vehicle purchase might depend on whether finance could be arranged, the Business Manager made an important contribution to sales generally as well as earning revenue directly through commissions on the finance and insurance packages. Because she considered the duties of the Business Manager to be crucial to the organisation, Mrs Sanders formed the view that it must remain the core of the new job. She saw the new role as simply the Business Manager with some additional administrative duties added in.

[12] This thinking was reinforced by what she says she heard, after she left, from her daughter (who still works for the respondent): that many administrative duties previously done by the Vehicle Clerk were being done by an administrative worker, leaving the bulk of the Vehicle, Finance and Insurance Manager's time available to perform work that had previously fallen to the Business Manager.

[13] On Mrs Sanders' behalf Mr Skelton argued that "*in assessing two positions... looking at a job description is but one means of comparison and... the reality of what happens on the ground is highly relevant.*" I accepted this and spent some time

questioning witnesses who were in a position to comment on how things are being done in practice. These witnesses included Euan Sears (the respondent's Managing Director) John Ingham (Director and founding shareholder of the Respondent) the person who is now doing the Vehicle, Finance and Insurance Manager role and Mrs Sanders' daughter.

[14] It was clear from this evidence that the new job does incorporate the work of both former positions. Some administrative duties are done by other staff but I was satisfied that the time of the current incumbent is split, pretty much evenly, between the duties of the two old roles. This is also reflected in the level of remuneration for the new job which is approximately half way between that for the old Vehicle Clerk role and that for the old Business Manager.

[15] I am satisfied, from this evidence, that the new role was different from both of the old roles.

(ii) What were the selection criteria and were they disclosed to Mrs Sanders?

[16] There ended up being little real dispute about what Mrs Sanders knew of the selection criteria for the new role. She was simply provided with the job description and told that selection would be based on ability to perform the position as set out there. Like the other candidate Mrs Sanders underwent an interview with Mr Sears and Mr Ingham. They told me that they saw this as an opportunity for Mrs Sanders to sell herself. No notes were taken at the interview and there was no attempt to weight responses to questions or score the candidates. Mr Sears told me that because there were only two applicants, both of whom were known to the two interviewers, they felt no need to record their impressions.

[17] The interview took place on 8 September and lasted less than half an hour. On 9 September Mrs Sanders was called to a further brief meeting to be told she was unsuccessful, and that her employment would be terminated on a month's notice as provided for in her employment agreement. Mrs Sanders was shocked. Because she believed the new role was essentially her old job she had fully expected to be the successful candidate. She asked who got the job but Mr Sears and Mr Ingham

declined to tell her. Mrs Sanders subsequently found out who had been appointed when the announcement was made via email to all staff.

[18] There is no dispute that Mrs Sanders was given no other feedback about why she did not get the job. When asked to explain what had led them to appoint the other applicant over Mrs Sanders, Mr Sears and Mr Ingham said they thought that it went without saying that skills, experience, personality and potential would be considered when assessing the abilities of the applicants. They agreed that there was ‘not a lot in it’ and that either of the two applicants had the ability to do the job. They said that the other applicant had good administrative skills and a better knowledge of the Dealer Management System. They claimed that Mrs Sanders admitted to them, during the interview, that that she did not have much experience with the Dealer Management System although they say she also told them that she was able and willing to learn. Mrs Sanders does not recall that comment but I was prepared to accept that she said this since it was in fact the case.

[19] The other applicant reported to Mr Sears and he told me he had observed her speed, efficiency and ability to learn quickly. He and Mr Ingham also saw her as ‘having potential’ and possessing good personal qualities including an outgoing nature and an ability to see the big picture.

[20] It was argued for the applicant that the respondent breached s4(1A)(c) of the Employment Relations Act when Mr Sears and Mr Ingham failed to tell Mrs Sanders the selection criteria that they would use to make their decision. I was referred to *Jinkinson v Oceania Gold (NZ) Limited* where (as here) two positions were disestablished and a new one created. In due course I was also referred to the decision of the full court of the Employment Court in *Vice Chancellor of Massey University v Wrigley & Ors* [2011] NZEmpC 37. Mr Skelton pointed out:

“The full Court referred to the statutory purpose of s4 (1A) at paragraphs [47] – [48] of the judgment. As to the type of information that must be provided, this...includes the “perceptions and opinions of those involved in the process leading to the decision.”

The Massey University judgement supports the submissions made on behalf of Mrs Sanders that in breach of Section 4(1A) (c) of the Act, Mrs Sanders was not provided with access to information relevant to the continuation of her employment, nor full and fair opportunity to comment on the information before the decision was made to dismiss her. In particular she was not told of the selection criteria that Mr Ingham

and Mr Sears would use to select who would be offered the Vehicle, Finance and Insurance Manager role, nor the facts and opinions that they were relying upon in making their decision.”

[21] In submissions for the respondent Mr Blake asserted that selection criteria were provided for the Vehicle, Finance and Insurance Manager position. He argued that because it was a new role, and the applicant’s previous (unique) role had been disestablished, there was no additional obligation on the Company to consult about the criteria. This, he said:

“was not a ‘many to few’ redundancy scenario where both applicants had the same roles, and the Company needed to apply selection criteria to determine which applicant would be appointed to the new role.”

[22] Mr Blake also argued that Mrs Sanders was fairly considered for the new position.

Determination

[23] Both *Wrigley* and *Jinkinson* can be distinguished on their facts from the present case. In *Jinkinson* the Court found as a fact that the new position was not significantly different to the one Mrs Jinkinson had formerly occupied. I have not been persuaded that that is the case here. In *Wrigley* also the new jobs were essentially no different from the old and there was a “many to few” situation.

[24] However the principles set out in *Wrigley* and *Jinkinson* remain. The obligations contained in s. 4 of the Employment Relations Act apply to every employment relationship. The question for the Authority is how they should be applied in the present case, where the facts (as I have found them) are somewhat different to the leading cases to which I was referred.

[25] Section 4 (1A) (c) provides that the duty of good faith:

“requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of one or more of his or her employees to provide to the employees affected-

- 1. access to information, relevant to the continuation of the employees’ employment, about the decision; and*

2. *an opportunity to comment on the information to their employer before the decision is made.*

[26] At paragraph [63] of *Wrigley* the full court of the Employment Court stated:

“...we comment briefly on the nature of information potentially within the scope of s 4(1A) (c). It must include not only information which is written down or otherwise recorded but also information in the minds of people.

[27] The respondent did meet its obligations in relation to the decision to merge the two positions into one. That was however only the first of two major decisions which determined whether her employment would continue. She was also entitled to access to information about the second decision as to whether she would be redeployed to the new role.

[28] Although Mrs Sanders was provided with the job description, she was not told how much emphasis was being placed on knowledge of the Dealer Management System. She was not told of the extent to which personal qualities were going to be taken into account or how the opinions Mr Sears and Mr Ingham held about how those personal qualities weighed in the balance, especially as compared to sales experience. The respondent also failed to tell her the remuneration package for the new position. Although the base was similar to that for her old role, the commission structure was less favourable and as a result the position ended up paying significantly less than the Business Manager role (although significantly more than the old Vehicle Clerk role.)

[29] In short, Mrs Sanders was provided with some, but not all of the information relevant to the decision about who would get the new job. In this way, Mr Sears and Mr Ingham failed to provide Mrs Sanders with information which was relevant to the continuation of her employment.

(iii) Was the respondent’s choice of appointment sustainable?

[30] Mrs Sanders was firmly of the view that in every aspect of the new role she had more skills and experience than the person who eventually got it. Overall, she had more years of experience than the other person and in jobs at a more senior level. Mrs Sanders had consistently been a top performer in sales. She had worked as Financial

Controller for the previous owner of the business, and she believed she was more than competent at any administrative task. She also had a degree, unlike the successful applicant.

[31] Mrs Sanders' rival stood in for Mrs Sanders in the Business Manager role when Mrs Sanders was on leave or on other occasions when it was necessary. In the course of her Vehicle Clerk role she had also become fully conversant with the new Dealer Management System, while Mrs Sanders was not familiar with all relevant aspects of that system.

[32] Mr Sears and Mr Ingham said that they were satisfied with the other applicant's performance when she had stood in for Mrs Sanders. Although Mrs Sanders had much more experience in sales, they felt the former Vehicle Clerk had shown that she could handle sales work. The Vehicle Clerk also had a head start over Mrs Sanders in respect of her knowledge of the Dealer Management System, although it was accepted that it would not have taken a competent woman like Mrs Sanders long to come up to speed with it.

[33] I conclude that neither candidate would have had any real difficulty picking up whatever skills were required to do the tasks that were outside her previous job. The evidence was overall consistent with the assertion that there was 'not much in it' and that either woman could have done the new job.

[34] The question for determination is whether it was unsustainable for the respondent to choose the former Vehicle Clerk for the new role ahead of Mrs Sanders. In circumstances where both candidates were more than capable of doing the job, and where the new position was not the same as the Business Manager role I am satisfied that it was open to the respondent to choose the other candidate over Mrs Sanders.

(iv) Was the appointment decision improperly influenced by the perception that Mrs Sanders had damaged an important business relationship?

[35] On 23 April 2009 two representatives of MBFSL (Mr Froehlich and Ms Mullane) visited the respondent's premises unannounced. Approaching Mrs Sanders directly they raised concerns that she had been responsible for submitting several

finance applications which lacked information needed to assess the level of risk involved in the application. Mrs Sanders was distressed by being confronted in this way and found the manner of Mr Froehlich, in particular, very aggressive. No resolution was reached.

[36] Mr Froehlich and Mrs Mullane immediately sought out Mr Sears and Mr Ingham. Mr Ingham asked Mr Froehlich and Mrs Mullane to put their concerns to him in writing. After they had left he advised Mrs Sanders of this and told her that he considered it inappropriate that MBFSL had approached her directly rather than coming to him first. He took no other action at that stage.

[37] By 6 May, MBFSL had provided its concerns in writing. The material included specifics (in the form of file notes) relating to certain allegedly defective applications but did not provide the names of the individuals who had prepared the file notes. Mr Ingham put the material to Mrs Sanders and on 15 May she responded, but not to the specific allegations. She advised that she would not do so without being provided with the names of the file note authors.

[38] Mr Ingham took the view that he was under an obligation to investigate these concerns once they had been properly raised. He also felt that the allegations, if substantiated, could amount to breaches of Mrs Sanders' duties of fidelity and of her obligation not to undermine the respondent's goodwill with business partners and suppliers. In the absence of a response to the specific allegations, he decided that a formal disciplinary investigation should commence.

[39] The disciplinary meeting (attended by the complainant, Mr Froehlich) proceeded on 10 June. The principal outcome of the meeting was a letter from Mr Froehlich (dated 22 June) which confirmed his company's willingness to work with Mrs Sanders on two conditions. These were that she be given further training in what MBFSL required in relation to finance applications and that the respondent's management check any applications about which MBFSL had concerns in the future. The letter was copied to Mrs Sanders.

[40] Mr Sears and Mr Ingham found these conditions acceptable. They took the view that if Mr Froehlich was happy, no further action was required. Mrs Sanders did

not feel the same way. Her view was that she had been unfairly accused and was entitled to an apology. She told Mr Sears this on more than one occasion. She was also made anxious by the fact that the proposed training (which she was willing to take up) never eventuated.

[41] On 4 August, having had no formal follow up of any sort, Mrs Sanders wrote to Mr Ingham saying:

“Almost two months have elapsed since the “Disciplinary Investigation Meeting” that I attended at Mercedes Benz offices on 10 June.

I have not received any further communication from [Inghams] on this issue so, unless I hear to the contrary, shall assume that my responses to Ingo Froehlich’s defamatory allegations met with [Inghams’] satisfaction and that I have been exonerated of any wrongdoing.

Euan, would you please confirm that there is no reference to this investigation in my personnel file or, if there is, then a formal letter from you confirming my exoneration is filed (with a copy to me)...”

[42] Within days of this letter the restructuring was underway. The respondent says that process overtook events, and for this reason, no attempt was made to reply to Mrs Sanders.

[43] It is the Respondent’s position that the complaint from MBFSL had no bearing at all on the decision to appoint the former Vehicle Clerk to the new role. The Respondent says that as far as it was concerned, both MBFSL and Mr Ingham were satisfied with the outcome of the investigation and the Respondent was therefore happy to let the matter lie. Mr Ingham also told the Authority that *“MBFSL need us more than we need them”* and that the Respondent was in a position to source finance elsewhere.

[44] It is argued in submissions for the Respondent that the applicant bears the onus of showing that the termination of her employment was not genuinely for the reasons given. I was referred to *Trotter and Telecom Corporation of New Zealand [1993] 2 ERNZ 659* and to the following comment at page 682:

“Although the general evidential burden of proving the dismissal to be justified rests on the respondent employer, the applicant, in advancing a theory such as this, particularly when it involves an accusation of reprehensible behaviour cynically

undertaken, must be taken to assume the burden of convincing the Court that the theory has substance.”

[45] This submission is accepted as is the submission that there was no direct evidence to show that the appointment decision was influenced by the perception that Mrs Sanders had damaged an important business relationship.

[46] Mr Skelton did not attempt to assert otherwise but argued rather that the circumstantial evidence in this case must be given considerable weight. He submitted:

“While one piece of circumstantial evidence may not in itself be sufficient to cast doubt on an employer’s claim that their decision to dismiss arose out of a genuine redundancy situation, a combination of circumstances may strongly point to the real underlying reason for the decision not to appoint Mrs Sanders...”

[47] He went on to argue that the following combination of circumstances pointed to the “real underlying reason” for the respondent’s actions: the threats made by MBFSL, the events following on from the complaint, the respondent’s failure to bring the disciplinary process to a conclusion and the fact that there was “*no rational objective reason*” to appoint the other candidate.

[48] Given the sequence of events, it is easy to see why Mrs Sanders might have inferred that the respondent was influenced by events concerning MBFSL. However I consider that all the strands mentioned by Mr Skelton would have to be present for me to accept that this was indeed the case. The final strand is lacking. I do not accept that in this case there was no “rational or objective reason” to appoint the other candidate.

[49] I am not therefore persuaded that the respondent was improperly influenced by the perception that Mrs Sanders had damaged, or might further damage, an important business relationship.

(v) Was the dismissal justified in all the circumstances?

[50] The factual findings can be summarised as follows. The new role was different from the old position of Business Manager. The appointment of the other candidate was not unsustainable and there was insufficient evidence to support a finding that the appointment decision was improperly influenced by the desire to placate MBFSL.

[51] The respondent's process was at fault in only one regard. That was that Mrs Sanders was not fully apprised of what was in the minds of Mr Sears and Mr Ingham regarding the decision about who would be kept on in the new role and who would be let go. In this way the respondent failed to provide Mrs Sanders with access to all information relevant to the decision to dismiss her.

[52] This is not however one of those situations where the respondent was looking for a particular skill and the grievant was deprived (through ignorance) of an opportunity to make it known that she had that skill. These were circumstances where either candidate could do the job, and there "was not much in it" in terms of who got it. There was no evidence that Mrs Sanders had anything further to say that would or could have changed the respondent's final decision. In all the circumstances it is simply not possible to say that the decision to appoint the other applicant over Mrs Sanders was not fair and reasonable. It follows that the termination of Mrs Sanders' employment has been justified.

[53] It is open to the Authority to find a grievance of a type other than that alleged. This leads to the question whether the respondent's failures to provide access to relevant information about the redeployment decision and to give an opportunity to comment on it gave rise to a grievance (other than unjustified dismissal.)

[54] I find that the lack of feedback led directly to Mrs Sanders' loss of trust to her lack of comprehension of what happened and to her very evident ongoing distress. In this way I accept she was disadvantaged by the respondent's actions.

[55] It is open to the Authority to award a remedy for a poor redundancy process even where the process is not so deficient as to render the termination unjustified. I consider this an appropriate case to do so. In these circumstances I consider a modest award of compensation to be appropriate consistent with long practice following *Coutts Cars Limited v Baguley* [2001] ERNZ 660 (which employer was coincidentally Ingham's predecessor in running the business in which Mrs Sanders was employed.)

[56] **I therefore order that the respondent, Ingham Motor Holdings Limited, pay to Mrs Sanders the sum of \$5,000.00 compensation for disadvantage pursuant to s. 123 (c) (i).**

Costs

[57] The question of costs is reserved. Any application for costs should be made within 28 days of the date of this decision and should be accompanied by a memorandum in support.

Yvonne Oldfield

Member of the Employment Relations Authority