

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

<b>BETWEEN</b>	Geraldine Schnauer
<b>AND</b>	Independent Liquor New Zealand Ltd
<b>REPRESENTATIVES</b>	Don McKinnon for Applicant Clive Smith for Respondent
<b>MEMBER OF AUTHORITY</b>	Y S Oldfield
<b>INVESTIGATION MEETING</b>	1 December 2006
<b>SUBMISSIONS</b>	15 December, 20 December 2006
<b>DATE OF DETERMINATION</b>	20 February 2007

DETERMINATION OF THE AUTHORITY

[1] In late 2005 high profile businessman Michael Erceg died suddenly in a helicopter accident. Mr Erceg was of course the owner of the respondent company and a man who was regarded with respect and affection by all those who gave evidence to me. This matter concerns an employment relationship problem that arose in the aftermath of his death. Within weeks of his funeral Mr Erceg's widow and her management team moved to sell or close down marginal parts of the business, including UK and US operations, and made a hundred staff (almost a third of the total) redundant in the process. Ms Schnauer, who was based in New Zealand but had global responsibility for New Product Development, was amongst the redundant employees. She questions both the genuineness of her redundancy and the fairness of the way in which it was implemented.

[2] By the time her employment was terminated Ms Schnauer had worked for Mr Erceg for five years, both here and in the UK. With a background and skills in marketing, she began as a brand manager but then moved into work involving the development of concepts (including packaging, intellectual property, and branding) from inception right through to sale. In October 2005 she was transferred back to New Zealand to take up a new role reporting directly to Mr Erceg. Her responsibilities included projects in the UK, US and Canada, although other markets, including Asia, were in contemplation. She worked on new product development (NPD), existing brands going into new markets, and on intellectual property issues. Her responsibilities did not include NPD for the local and Australian market, nor did she directly manage the NPD teams here or overseas.

[3] Development of global and other new business was something Mr Erceg had overseen personally. Prior to his death he planned to reduce the UK operation because it was not performing as well as he wished. The US was also a cause of some concern although Canada, which was a stand alone operation, was doing well. In offering Ms Schnauer the opportunity to return to New Zealand he told her that the long term future of her position back here was not assured and would be reviewed in June 2006. This was in part because the role was related to the global business and in part because it was a newly created position which had yet to prove its worth to the organisation. He told her that if she were made redundant at that time she would be "looked after generously." Ms Schnauer and her partner wanted to return to New Zealand to live, and she trusted Mr Erceg as a man of his word, so she accepted these terms.

[4] Tragically, within weeks of Ms Schnauer's return home she and other staff were engaged in helping with the hunt for Mr Erceg's helicopter. It was a difficult time for all concerned. Ms Schnauer felt that it was made worse for her because of the key role now being played by Operations/Human Resources manager Bob Lewis, with whom her working relationship had never been good. She felt excluded by management colleagues and was hurt that she was not invited to fly over the crash scene or attend a private memorial service as other managers were.

[5] She was also concerned that her duties were being reduced from what she had originally understood she would be doing. Prior to Mr Erceg's death he had discussed with her the possibility of changes to the UK operation and had obtained her agreement to take on direct responsibility for certain new product work being done there. The resulting redundancies had eventuated, as planned, in early December however by then, Mr Erceg's death had intervened and the work was passed not to Ms Schnauer but to others. When (at the time) she asked Mr Smith why this work had not come to her, as previously discussed with Mr Erceg, he had said she was "*too busy with legal work.*"

[6] Nonetheless she got on with making a start in what was still a very new role for her, opting to work over the summer the better to do so.

[7] On Friday 6 January 2006 Executive Director, Roger Smith called Ms Schnauer in to see him and told her that due to a decision to close the global business her position was no longer required. He asked her to meet with him and Mr Lewis again on Monday 9 January to discuss her employment situation further and to give them any suggestions she might have regarding redeployment. After the meeting, Ms Schnauer emailed protesting that this timeframe would not permit her to seek advice or representation in relation to the meeting. Mr Lewis advised that the meeting would be put back until 9.30am on Tuesday 10 January but no later because he and Mr Lewis planned to fly out immediately to meet with affected staff in the UK and US.

[8] Ms Schnauer was unsuccessful in her attempts to contact an employment specialist at such short notice. She attended the meeting of 10 January accompanied by her partner's father. Although he is a solicitor, I accept that he was present as a support person and not as a professional adviser.

[9] At the meeting of 10 January Mr Smith and Mr Lewis reiterated that the company was planning to sell its UK, US and Ireland businesses and told Ms Schnauer that it did not have any alternative roles available for her. She responded with the following points:

- the businesses had not yet been sold or closed down;
- work related to the global business took up only 20% of her time and she could demonstrate this by showing them a daily log of what she had been doing;
- Ms Schnauer reminded Mr Lewis and Mr Smith that he had said she was "too busy" to take on the work of the UK staff made redundant in mid December.

[10] Ms Schnauer did not, however, identify any redeployment options that she thought would be suitable for her. Mr Lewis then proceeded to say that, in that case, it was necessary for her to be made redundant, effective immediately. She was told that she would not be required to work out her notice and would leave that day. She received outstanding wages and holiday pay to that date, a month's pay in lieu of notice and redundancy compensation of approximately three months' more salary. There was no farewell party and no opportunity to say goodbye to colleagues or clients.

[11] A small part of the UK business (certain licensing rights) was eventually sold. The rest of the UK and US operations were shut down, and staff in those countries made redundant. Nonetheless Ms Schnauer does not believe that her redundancy was genuine. She says that she had been involved in more than just the UK and US business. Some of her work (such as legal work associated with intellectual property issues) remained, and she felt that redeployment should have been considered. She believes that her redundancy was motivated

by the personal animosity Bob Lewis felt towards her. She also says that this is borne out by what she says was a rushed and perfunctory redundancy process.

[12] The principal issues for determination are therefore whether Ms Schnauer was genuinely redundant and whether the process which led up to the termination of her employment was fair. These issues are interconnected and will be addressed together.

[13] In addition, should Ms Schnauer establish that the alleged redundancy has not been justified there will be issues around the question of remedies. Ms Schnauer maintains that she is entitled to lost wages as a result of her personal grievance, without any set off against her redundancy compensation. She also seeks compensation for hurt and humiliation associated with her grievance.

### Was the redundancy genuine and was the process fair?

[14] Ms Schnauer has several reasons for doubting the genuineness of her redundancy. These are:

- i. What she considers to be Mr Lewis's longstanding antagonism towards her;
- ii. The fact that she was made redundant before the global businesses were completely closed down and that only parts of her job were affected by the changes that took place;
- iii. The ignorance displayed by Mr Lewis and Mr Smith about her work and their unwillingness to hear more about exactly what she did;
- iv. The inadequacy of efforts to explore redeployment options for her;
- v. The unnecessarily and unreasonably rushed nature of the process, which Ms Schnauer does not believe was conducted in good faith.

[15] In submissions, Mr McKinnon has argued that the flaws in the process were so serious that it simply cannot be established that it was a genuine redundancy, notwithstanding the steps the respondent has subsequently taken to close down its overseas manufacturing and sales operations.

[16] I consider all of these to be valid criticisms. Although there had never been formal performance concerns with Ms Schnauer, Mr Lewis emphasised to me her shortcomings and put her steady progression up through the ranks of the company down to Mr Erceg's soft heartedness. When I questioned him about the relevance of this evidence in relation to a dismissal which was purportedly for redundancy, he told me that it was relevant to the question of redeployment, because Ms Schnauer's difficult personality made her impossible to place in any other role.

[17] No one I heard from disputed that Mr Erceg was a generous employer. However he was also a very astute and successful businessman. I consider it unlikely that he brought Ms Schnauer back to a new and well paid role in NZ simply out of the goodness of his heart. I find it more probable that he considered she had something worthwhile to offer the company. Mr Lewis's criticisms of Ms Schnauer have served only to confirm that he did indeed have a long standing personal antagonism towards her. I am not confident that this did not cloud his judgement in relation to the question whether Ms Schnauer's position, or Ms Schnauer herself, should be made redundant.

[18] At my meeting with them, Mr Lewis and Mr Smith explained to me that suitable redeployment opportunities were limited because the total number employed by the company was not great, and most of them were involved in manufacturing. This is accepted. However neither Mr Lewis nor Mr Smith appeared to know much about what exactly Ms Schnauer did and were unable to rebut her evidence that the closure of the UK and US operations, with its consequent local redundancies, affected only a small part of her work. Consequently I am not satisfied that they had gathered all the information they needed to properly consider what role Ms Schnauer might have continued to play in the organisation.

[19] Finally it is undoubtedly the case that the process was very rushed. Taking the haste of the termination into consideration along with all the other factors I am unable to conclude that Mr Lewis and Mr Smith were in a position to make a fair and reasonable decision. I accept that the process was so inadequate that it becomes impossible to say with confidence that Ms Schnauer's position, or Ms Schnauer herself, were at that time genuinely redundant.

## Remedies

[20] Ms Schnauer told me that she searched actively for employment but was not successful until July 2006. She told me that the specialised nature of her experience limited what was potentially available to her, as did the fact that she was seeking to maintain her seniority and salary package (approximately \$130,000.00.) Ms Schnauer is also very aggrieved at the level of redundancy compensation she received, which was strictly in line with the company standard set out in its human resources policies. She had construed Mr Erceg's comment that she would be "looked after generously" to mean that she would get more than this.

[21] Mr McKinnon has argued that Ms Schnauer should be awarded both compensation for hurt and humiliation and reimbursement of lost earnings, and that there should be no set off against the redundancy payments she has already received. He says that but for the unjustified dismissal, she would have continued in employment until the scheduled review of her position in June, at which time she would have been entitled to redundancy payments as well. He says that Ms Schnauer is therefore entitled to five months lost earnings.

[22] I reject the suggestion that Mr Erceg's comment amounted to an undertaking to provide enhanced redundancy pay. Mr Erceg was known for his even-handedness as well as his generosity and I consider it likely that he intended his standard package to be regarded as "generous." In any event, Ms Schnauer's terms of employment for the new role, which superseded all earlier agreements, were finalised subsequent to the comment. Since they contain no express terms relating to redundancy the standard provision (available for all to see in the Human Resources policies on the company's G drive) must apply.

[23] I also reject Mr McKinnon's submissions that there should be no set off. Although Ms Schnauer was on notice that her position would be reviewed in June there is no suggestion her employment was for a fixed term and there was nothing to preclude an earlier review should that be warranted, as it was in the circumstances resulting from Mr Erceg's death. Nor did I hear evidence to establish with certainty that Ms Schnauer would have been made redundant in June or at any other subsequent time. In this regard her case can be distinguished from others where an unjustified dismissal has been followed by large scale redundancies in relation to which the grievant has been entitled to compensation.<sup>1</sup>

[24] It has not been shown that the termination of her employment was genuinely for reasons of redundancy nor can it be predicted what the future of her employment might have been if the respondent had properly turned its mind to the question. Remedies fall to be determined in the same way as for any other unjustified dismissal. Since it has not been established that Ms Schnauer was or ever would have been redundant the compensation she received upon termination must be taken into consideration when remedies are determined.

[25] Notwithstanding Ms Schnauer's evidence about her difficulties finding suitable work, I am not satisfied that she made every attempt to mitigate her losses. She is a young and competent person with skills which are sought after in the current labour market. I consider her return to work to have been hampered by her inflexibility about the sort of work she was prepared to consider. In addition to a payment in lieu of notice, Ms Schnauer received redundancy payments equating to roughly three months wages. I consider that this adequately covers reimbursement for lost earnings. No further order is made under this head of claim.

[26] However, a payment for compensation for hurt and humiliation is in order. Ms Schnauer described her dismissal as deeply upsetting and her on-going distress was apparent at my

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<sup>1</sup> Carter Holt Harvey v Yukich [2005] 1ERNZ 300.

meeting with the parties. In all the circumstances, including both her recent return to New Zealand and Mr Erceg's death, this reaction is entirely credible. I consider a relatively high award to be appropriate compensation. I note also that in all the circumstances of this case there can be no question of any contributory conduct on Ms Schnauer's part.

**[27] The respondent is therefore ordered to pay to Ms Schnauer the sum of \$10,000.00 pursuant to s.123 of the Employment Relations Act.**

### Costs

[28] At this stage I leave it to the parties to discuss this issue. In the event that they cannot resolve it between themselves, any request for the Authority to determine it should be filed no later than 28 days from the date of this determination.

Y S Oldfield  
Member of Employment Relations Authority