

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Noeline Peach (Applicant)  
**AND** Bagirathi Enterprises Limited t/a Vita Health Stores (Respondent)  
**REPRESENTATIVES** Mark Nutsford, Advocate for Applicant  
Shireena Bagirathi, Director of Respondent  
**MEMBER OF AUTHORITY** Robin Arthur  
**INVESTIGATION MEETING** 22 February 2006  
**DATE OF DETERMINATION** 27 February 2006

**DETERMINATION OF THE AUTHORITY**

[1] The applicant alleges her dismissal for redundancy on 15 June 2005 was unjustified. She says the redundancy of her role as manager of the respondent's health products store was not genuine and that it was unfair because there was no consultation about the prospect of redundancy. She seeks reimbursement of lost wages, compensation for distress and her costs.

[2] The respondent replies that the redundancy was for genuine business reasons, particularly that the staffing of the store was reorganised to reduce salary costs in order to assist the operation 'break even' or return a profit as it was prepared for sale. It says that the applicant was aware by no later than January 2005 of the prospect of sale of the business and her likely redundancy.

[3] This employment relationship problem was not resolved in mediation. The evidence available for the Authority's investigation comprised statements of problem and reply; a written witness statement from the applicant; copies of correspondence between the applicant and the respondent's director, Shireena Bagirathi; and additional evidence given under oath at the investigation meeting by the applicant and Ms Bagirathi. There was an opportunity at the meeting for the parties to ask questions of the other party and make oral closing submissions on the issues. Mr Nutsford made submissions for the applicant while submissions for the respondent were heard from Ms Bagirathi and her support person, Ben Atterbury.

**Issues**

[4] The issues for resolution are:  
(i) whether the respondent's decision to make the store manager's position redundant was made for genuine business reasons; and,  
(ii) if so, whether the redundancy was implemented in procedurally fair manner; and  
(iii) whether in all the circumstances at the time, the respondent's actions in dismissing the applicant for redundancy were what a fair and reasonable employer would have done.

## **Background**

[5] The applicant started work at the store in Onehunga more than 15 years ago. She was offered and accepted a job as sales manager of the store when the respondent purchased the business in July 2002.

[6] The respondent company is owned by Ms Bagirathi and her former husband. The couple divorced last year and Mr Bagirathi now lives overseas. Plans to sell the business arose from Mr Bagirathi's wish to end his involvement in the company, including obligations as a shareholder for a bank loan taken to purchase the business.

[7] The applicant was employed under the terms of an individual employment agreement. While there is disagreement about when this was provided to the applicant, the parties agree that the terms of the agreement are the basis on which the applicant was employed. The terms include a redundancy clause stating that in the event that the employee's position "becomes redundant to the needs of the company" and the company is not able to redeploy the employee, the company will provide the employee with four weeks' notice. The clause also provides two weeks' salary as compensation for redundancy. It includes a 'technical redundancy' provision that no compensation is payable where the business is sold and the new owner offers the employee a job on the same or substantially similar terms with recognition of previous service.

[8] On 15 June 2005 Ms Bagirathi telephoned the applicant at the store and asked her to wait until she arrived there. On arrival Ms Bagirathi told the applicant that there was "no easy way to say this" but she was giving her two weeks' notice. The applicant was given a letter stating that from 28 June the sales manager position would be changed from a full-time managerial position to a new part-time sales position. The letter stated that "this situation has come about rather suddenly" and the applicant could take the next two weeks off and "will not need to be at work as of tomorrow". It also stated that "new roles will be created within the next couple of months" and the applicant was welcome to "reapply" if she was interested. It also offered to provide a reference.

[9] The applicant says she asked Ms Bagirathi why she was not getting four weeks notice and two weeks redundancy compensation as provided in her employment agreement. She then cleared her locker and left the store. She has not worked there since.

[10] A few days later – when exactly is disputed but not relevant – the applicant received a further letter from Ms Bagirathi dated 17 June 2005. This accepted that the termination of the applicant's employment was "a redundancy situation" and confirmed that the applicant was entitled to four weeks' notice and two weeks redundancy pay. The letter stated that Ms Bagirathi has spoken with the applicant in January 2005 about the prospect of selling the shop if the business did not improve but the business had continued to trade at a loss and needed to be restructured. It stated that the applicant was not required to work during her notice period and offered to provide a reference if required.

### **Was the redundancy genuine?**

[11] The Courts have long accepted the managerial prerogative of employers to make their businesses more efficient by measures such as reorganisation and cost saving steps, including restructuring that reduces staff numbers. The law does not judge whether a redundancy was commercially avoidable but only whether it was made for genuine reasons.

[12] In the present case Ms Bagirathi, the respondent's sole director, made a business decision to reduce costs by restructuring the staffing of the store. She decided to work in the store herself and

cover other hours by employing casual or part-time staff. She says she also took the opportunity to employ part-time staff who had additional knowledge which would assist sales and now has two part-time staff, one a trained herbalist and one a trained homeopath.

[13] Ms Bagirathi says the decision to make the applicant redundant in June was driven by demands from her former husband for sale of the business. A prospective sale in January had fallen through. The business was operating at a loss – as it had over the previous three years – and needed to reduce total costs in order to break even or return a profit so that it was a more attractive prospective for potential purchasers.

[14] In these circumstances, the Authority's role is not to substitute its judgment for the commercial judgment of the employer. There was some suggestion in the evidence that Ms Bagirathi also had some criticism of the applicant's performance of her work – that she had not worked well with other staff, was reluctant to attend training seminars held by product suppliers and had resisted learning computer skills. However she had provided the applicant with a reference in January which described her as reliable, trustworthy, responsible, having strong selling skills and an extensive knowledge of natural supplements. I consider that her criticism of the applicant, made in the statement of reply and elaborated on at the investigation meeting, were most likely generated by the heat of the present dispute. Rather than raising the issue of whether an ulterior purpose was at play, I accept Ms Bagirathi's evidence that, at the time of making the redundancy decision, her overriding motive was the business' need to reduce costs, the largest of which were staffing costs.

#### **Was the redundancy carried out in a fair and sensitive way?**

[15] The applicant says she was shocked by the abruptness of her redundancy. Ms Bagirathi says she told the applicant in January that the business could be sold and to start looking for other work. At the applicant's request, the respondent provided a reference dated 21 January 2005.

[16] However the applicant says she did not look for another job at that time as she considered she would deal with that issue when and if it arose. In March she was told that a prospective sale had fallen through. Ms Bagirathi then decided to stop working in the store herself, work full-time for another business and have the applicant manage the store alone.

[17] Ms Bagirathi set out the plan in a memo with an attached job description and dated 15 March 2005. This described the applicant's role as Sales Manager as continuing as "a permanent position". It included an offer of a monthly bonus which the applicant rejected, asking instead for a salary review. In May 2005 Ms Bagirathi confirmed a 5 per cent salary increase backdated to March.

[18] Following the reference to a "permanent" position in March and provision of a pay rise in May, I am satisfied that it was reasonable for the applicant to be surprised by a sudden redundancy announcement in June. Ms Bagirathi's letter of 15 June itself describes the situation as coming about "rather suddenly".

[19] Ms Bagirathi says she was not aware of any requirement to consult with an employee about the prospect of redundancy or seek any comment from employees before proceeding with a redundancy proposal. However her decisions were not made without access to advice. Ms Bagirathi says she spoke to her solicitor, her accountant and a friend experienced in employment issues during the process of her making the business decisions which included deciding to make the manager's position redundant.

[20] I find the respondent failed to properly consult the applicant about its proposal to make the store manager position redundant. The applicant was not given any opportunity or time to comment

on the proposal or how it might be carried out in a way that would minimise its effect on her. One practical effect of this lack of consultation is that the respondent cannot establish that it met its obligation under the applicant's employment agreement to consider redeployment to another role before making an employee redundant. The restructuring undertaken involved creating at least one new part-time position. Ms Bagirathi's evidence was that at the time of making the applicant's position redundant, she also had received the resignation of a part-time worker who she subsequently asked to stay to cover some hours. The applicant's evidence was that if a part-time role had been discussed with her at the time, she would have considered taking it. That is hypothetical now but the point is that the respondent did not explore that prospect with the applicant at the time when it should have consulted about, rather than suddenly impose, a redundancy. If it had done so – a matter which would have taken only a short time – it may have been able to redeploy the applicant or at least reduce the impact of the redundancy on her. The applicant was offered the opportunity to apply for a part-time role in the future but there was no evidence of any real attempt to do that rather – as submitted by Mr Nutsford – it was “lip service”.

### **Determination**

[21] For the reasons set out above, I find that the respondent's decision to make redundant the position of store manager was for genuine commercial reasons. However the implementation of that decision – both in how the applicant was told and dealt with – was procedurally unfair. The actions of the respondent were not those of a reasonable employer implementing a redundancy in a fair and sensitive way. The dismissal was unjustified and the applicant has a personal grievance.

### **Remedies**

[22] Remedies for a genuine redundancy carried out in an unfair way compensate for the manner of the dismissal, not the loss of the job itself. In these circumstances, compensation for distress – where appropriate – is not awarded for the hurt which likely would have been suffered in any event from loss of employment but only for the manner in which the dismissal was handled.

[23] The applicant has not worked since her dismissal by the respondent. She says she was too upset to look for work and had since moved to Levin to stay with her elderly father while she re-evaluates her future. She is on an unemployment benefit and has not applied for any jobs.

[24] In this case remedies for lost wages and compensation for hurt and humiliation arising from the loss of the job are not warranted. The applicant's employment agreement provided compensation for the loss of the job through the payment of redundancy compensation.

[25] However she is entitled for compensation for hurt and humiliation arising from the manner in which the redundancy was carried out. She was shocked by the announcement of her redundancy. She was required to leave immediately and did not get the opportunity to farewell customers she had known for many years. Her evidence was that her confidence to seek other work was undermined after dismissal from her workplace for the previous 15 years.

[26] Dismissal for redundancy is not a dismissal for fault. The employee is not regarded as having done wrong. In this case there is no need to reduce the remedies to take account of any actions of the employee which might have contributed to the situation that gave rise to the personal grievance.

**[27] In the circumstances of this case, and taking account of the range of awards in similar cases, I consider that an appropriate award of compensation for loss of dignity and injury to the applicant's feelings arising from the manner of her dismissal is \$4,000. Under section**

**123(1)(c)(i) of the Employment Relations Act 2000, I order the respondent to pay \$4,000 (without deduction) to the applicant.**

### **Other matters**

[28] The applicant also sought a penalty against the respondent under s130 of the Act in relation to provision of its wages records. In this case there is no suggestion that the applicant was not paid correctly or that information provided was inaccurate. The claim for a penalty was a technical point only. It is declined.

### **Costs**

[29] The applicant is entitled to a reasonable contribution to her costs in bringing her personal grievance application. The parties are encouraged to resolve this matter between themselves. In the event they are unable to do so, either party may apply to the Authority for a determination of costs. In the event of an application being made, an opportunity will be provided for the other party to reply before a determination is made.

Robin Arthur  
Member of Employment Relations Authority