

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Maureen Joy Taylor (Applicant)
AND The Centre for TPM Australasia Pty Limited (Respondent)
REPRESENTATIVES Mark Ryan, Counsel for Applicant
Christopher Eggleston, Counsel for Respondent
MEMBER OF AUTHORITY Leon Robinson
INVESTIGATION MEETING 7 December 2005
DATE OF DETERMINATION 3 April 20066

DETERMINATION OF THE AUTHORITY

The problem

[1] Ms Maureen Joy Taylor (“Ms Taylor”) claims she was unjustifiably dismissed from her employment with The Centre for TPM Australasia PTY Limited (“The Centre”). She asks the Authority to investigate and resolve the problem by making formal orders for reimbursement, compensation, arrears of wages and a penalty. The Centre says that Ms Taylor’s termination of employment was justified because she was redundant.

[2] The Centre is an Australian limited liability company not registered in New Zealand. It submits to the Authority’s investigation and resolution of the problem.

[3] The parties were unable to resolve the differences between them by the use of mediation.

The issues

[4] A number of issues fall to be determined in resolving the problems between the parties:-

- (i) Was there a dismissal?
- (ii) If so, was the dismissal justifiable?

These issues are dealt with in turn.

A dismissal?

[5] The Centre's Managing Director Mr Ross Kenneth Kennedy ("Mr Kennedy") telephoned Ms Taylor on Tuesday 13 July 2004. In this conversation Mr Kennedy told Ms Taylor that he would "have to let her go". Mr Kennedy informed Ms Taylor he had no option but to invoke the termination clause of her employment contract. That statement was a sending away which constituted a dismissal. I find that on Tuesday 13 July 2004, Ms Taylor was dismissed.

[6] It is necessary now to examine whether that dismissal was justifiable.

A justifiable dismissal?

[7] The starting point is always the agreed contractual terms of the relationship. The agreed terms of the relationship were set out in a letter of offer of employment dated 5 October 2002. As concerns termination, the letter of offer specified:-

10. termination of your employment will require one month's notice in writing by yourself or the CTPM, except in the case of your misconduct, when the CTPM would be entitled to terminate your employment without notice;

[8] That clause does not confer on the employer an unfettered licence to terminate without cause. Any termination must be justifiable.

[9] TPM held a conference of its consultants in Wollongong, Australia from 12 – 14 January 2004. At that meeting Mr Kennedy explained that during the first six months of the financial year, TPM had lost over \$120,000.00 with a collective chargeable time rate of only 44%. He emphasised the need to improve chargeable time. I give Mr Kennedy the benefit of any doubt and find that he warned that if the situation did not improve, TPM would have to review what regions it could continue to support. But he was no more specific than that.

[10] Ms Taylor was employed as a senior consultant. Her performance was reviewed every six months. At a review in February 2004, she agreed to work towards achieving a target of 75% chargeable time, I find, at the end of the ensuing 6 month period. That target however, was not achieved by either Ms Taylor or her colleagues.

[11] Mr Kennedy tells the Authority that for the period from January to June 2004 the group chargeable time dropped to 41%. He says the financial controller exerted considerable pressure on him to review activities and take corrective action. Mr Kennedy says he was reluctant to make any redundancies but the financial controller was adamant that the situation could not be allowed to continue. The financial controller recommended that one of the two New Zealand staff be "let go". Mr Kennedy tells the Authority he was given that advice about 1 - 2 months before Ms Taylor's termination.

[12] Mr Kennedy carried out a review of the New Zealand operation comparing Ms Taylor's performance with that of her New Zealand counterpart one Mr Burt. Advisedly, Mr Burt's chargeable time was better. Of most particular concern for Mr Taylor were the predictions for Ms Taylor's future chargeable time. According to Mr Kennedy's assessment, Ms Taylor would have no chargeable time for August, September and October 2004. By contrast, he assessed Mr Burt's prospect as much healthier. It is also the case that Mr Burt had longer service with the Centre and apparently was more experienced than Ms Taylor.

[13] On 12 July 2004 Mr Kennedy telephoned Ms Taylor for a regular six monthly performance review. Accordingly to Ms Taylor, Mr Kennedy conducted the review more as a personal attack on her. She says he made derogatory comments including that she was the reason the Centre was losing clients and in particular, Cryovac in Rotorua and Hamilton. She says Mr Kennedy demanded to know from her what she proposed to do about the client Cryovac. She says she told him she was not solely responsible referring to those higher up the reporting ladder. Mr Kennedy directed Ms Taylor to formulate an action plan with her manager Ms Merry Cloutier (“Ms Cloutier”). Mr Kennedy recalls matters differently and says that he was simply reporting to Ms Taylor client feedback. He says he explained to her his enquiries had revealed both of her remaining clients did not intend to proceed with her support once the existing cycle had concluded.

[14] I find that Mr Kennedy and Ms Taylor also discussed the likelihood of Ms Taylor’s existing client work continuing and prospects for new work. They discussed Ms Taylor’s previous six months chargeable time and the region’s performance. They further discussed a possibilities sheets which predicted only a 20% chargeable time for the ensuing six months. Mr Kennedy demanded that Ms Taylor provide him with an action plan.

[15] Ms Taylor submitted an action draft plan to Ms Cloutier for her input. Ms Cloutier did not respond.

[16] On 13 July 2004 Mr Kennedy telephoned Ms Taylor again. I find that he told Ms Taylor the action plan was unacceptable. He told her he wished to discuss future work and that they needed to put the past behind them and look to the future. Ms Taylor was not able to suggest future improvements to Mr Kennedy’s satisfaction. Mr Kennedy says he then reminded Ms Taylor of the warning he gave at the Wollongong conference. He reminded her too of her failure to achieve a 75% chargeable time target by June 2004. It was at that point that Mr Kennedy terminated Ms Taylor’s employment.

[17] He asked Ms Taylor whether she felt termination was the only alternative. He says she told him she could not see any future workload arising apart from her existing clients. Mr Kennedy confirmed the termination but offered Ms Taylor an assurance that if future chargeable work did become available during the month, he would reconsider the position.

[18] I accept Mr Kennedy’s evidence that Ms Taylor asked whether the termination was due to her performance. He told her the reason was purely due to a lack of current and foreseeable chargeable time within her region. He also told her the decision was based on a “last in, first out” basis. Mr Kennedy told her that she would be permitted to take her annual leave owing at the time. It was agreed that 13 August 2004 was to be Ms Taylor’s final day of service.

[19] Mr Kennedy confirmed the termination by email of the same date in these terms:-

Hi Maureen

Further to our phone discussion earlier to day, it is with regret that due to the down turn of our chargeable time in New Zealand and the unfortunate poor prospects of any short term turn around we must advise you of your one month notice of termination of employment as per clause 10 set out in our original letter of employment offer dated 5 October 2003.

Your last working day will be Friday 13 August 2004.

If you wish to take any of your outstanding annual leave entitlements during this one month notice period to seek future employment please let us know and we can approve such.

If you wish to forgo any of your one month notice to commence future employment please let us know and we can favourably look at this option for you.

Thank you for your contribution to the Centre for TPM (Australasia) since joining us on the 14 October 2003 and we wish you all the very best for your future.

[20] Ms Taylor sent Mr Kennedy this email:-

At this point in time I will work through my notice as per our discussion. Please confirm that my understanding from this morning is correct. This position has now be (sic) made null and void due to a downturn in NZ business. You can see no way forward at this moment for a turn-around and a business decision has been based on "last in and first out" and you will not be re-advertising my role.

[21] Mr Kennedy responded:-

Hi Maureen

Thanks for the confirmation of my email.

Unfortunately I have to agree with your assessment of the situation. Currently I can not see any turn-around and hence do not intend to re-advertise you (sic) role in the foreseeable future.

[22] By email of 27 July 2004 Ms Taylor advised Mr Kennedy as follows:-

I have taken some legal advice this morning with regards to the above and it appears given the documented evidence and voice messages, that I have a serious case of personal grievance than (sic) includes both-

- a: procedural unfairness, and*
- b: unjustified dismissal*

[23] Mr Kennedy responded:-

Hi Maureen

Obviously your email both surprises and disappoints me.

Can you please advise by 8.40 am on Wednesday 28 July 2004 (unless you are having further annual leave days, then it will be 8.40 am on your first working day back from annual leave) whether you wish for clauses:

- termination of your employment will require one month's notice in writing by yourself or the CTPM, except in the case of your misconduct, when the CTPM would be entitled to terminate your employment without notice;*
- you will be expected to maintain the highest standards of professional conduct at all times and comply with all policies of the CTPM;*
- you will not (except in the proper performance of your duties as an employee of the CTPM) during or after the termination of your employment disclose to any person whatsoever any information relating to the CTPM, its clients and members or its or their respective businesses which comes to your knowledge in the course of carrying out your duties, provided that this prohibition shall not apply to any information which comes into the public domain; you will be required to sign an agreement concerning the confidentiality of the CTPM's business information;*

in your contract of employment to be evoked by the CTPM regarding your current proposed actions.

*Regards
Ross Kennedy*

[24] The decision to terminate Mr Thompson's employment must be carried out fairly and sensitively. That is because the *Employment Relations Act 2000* ("the Act") obliges the parties to act towards each other in good faith and additionally, the law implies in all contracts of employment a duty of fair and reasonable treatment. These are duties which both parties owe to each other. Ms Taylor was entitled to be treated fairly and sensitively. I find that she was not.

[25] Her input was never sought in relation to the justification for her dismissal and therefore, she had no opportunity to provide feedback on it. She was entitled to be consulted when the prospect of her termination was in contemplation. I find that point was reached when the financial controller recommended a redundancy in New Zealand, on Mr Kennedy's evidence, one to two months before Ms Taylor's termination.

[26] From that point on however, there was no consultation whatsoever with Ms Taylor about her potential redundancy. While Mr Kennedy relies on a general caveat given at the Wollongong conference, that "warning" was not consultation with Ms Taylor for the purposes of her individual termination.

[27] The parties are also obliged to deal with each other in good faith. Section 4 of the Act required Mr Kennedy to provide to Ms Taylor access to information relevant to the continuation of her employment about the decision as well as an opportunity to comment on the information before the decision was made. This did not occur and the assessments Mr Kennedy carried out with respect to the New Zealand operation and a comparison with Mr Burt's situation were not provided to Ms Taylor and nor was her input sought in relation to it.

[28] As far as Ms Taylor knew, the telephone conversations she had with Kennedy on 12 and 13 July 2004 constituted her contractual performance reviews. While that was her understanding, Mr Kennedy actually had in mind her termination for redundancy. That was neither fair nor sensitive.

[29] The two telephone performance review conversations which preceded the decision were not meetings at which information was provided to Mr Thompson for her comment. They were not consultation meetings about Ms Taylor's potential individual redundancy. As such, their purpose was entirely different and they did not constitute consultation with Mr Taylor for present purposes.

[30] Mr Kennedy simply declared to Ms Taylor her employment was to be terminated at the conclusion of rather fluid discussions about performance and the suggestion of redundancy and termination was a distressing development for Ms Taylor.

[31] When Mr Kennedy resolved that redundancy was a possibility, he was obliged to communicate to Ms Taylor that prospect and then extend to her a real opportunity to comment prior to the decision being taken. Ms Taylor was not extended any such opportunity on either the substantive decision that her position was redundant or whether she ought to have remained employed as opposed to Mr Burt. Ms Taylor had no input as to whether her position was redundant or as to the possibility of redeployment within the company. She ought to have been involved in both of those matters but she was not.

[32] The Centre did not act towards Ms Taylor in good faith. I am satisfied that Ms Taylor's input was never sought in relation to the justification for her dismissal and therefore, she had no opportunity to provide feedback on the decision before it was taken. I am satisfied that it was practicable for there to have been consultation with her.

[33] I tend to the view that the real reason Ms Taylor was dismissed was because Mr Kennedy was unhappy with her performance. In that situation, termination for redundancy was not the appropriate response. An appropriate course of corrective action by way of performance management was the required response.

[34] The termination for redundancy, as a consequence of a performance review, was so completely devoid of process and tainted by sufficient unfairness that I conclude it amounted to a sham. Weighing both parties respective interests and considering matters objectively, I find that the decision to terminate Ms Taylor's employment was not a decision which a fair a reasonable employer would have made and it was not effected in a fair and reasonable manner. The Centre did not treat Ms Taylor fairly and sensitively. **I find that Ms Taylor has a personal grievance. She is entitled to remedies in settlement of that personal grievance.**

[35] Having made those findings and in considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the *Employment Relations Act 2000* to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[36] I find that Ms Taylor did not contribute to the situation that gave rise to the personal grievance I have found and there is no blameworthy conduct on her part which could constitute contributory fault requiring a reduction. There is therefore no basis for reducing the nature and extent of the remedies to be granted to Ms Taylor.

Remedies

[37] Ms Taylor is entitled to be compensated for the unfair and insensitive way she was dismissed. I accept that she has suffered humiliation, loss of dignity and injury to her feelings. I observed Ms Taylor's deep distress on a number of occasions during my investigation meeting. It is apparent to me that she continues to experience much stress and trauma, even now many months after her termination, as a result of what I have no doubt was an uncomfortable and unpleasant experience. In compensation for that hurt and humiliation and the injury to her feelings, I award her the sum of \$8,000.00. **I order the Centre for TPM Australasia PTY Limited to pay to Maureen Joy Taylor the sum of \$8,000.00 as compensation pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000.**

[38] Ms Taylor seeks reimbursement. I have said that I considered Ms Taylor's termination for redundancy a sham. On the evidence I have gathered, I am not confident in concluding Ms Taylor's redundancy would have followed in any event, because I do not consider the Centre is entitled to reach that view in the complete absence of a fair process. Ms Taylor has suffered loss of income because her employment was terminated in circumstances that it should not have been. I am therefore satisfied that Ms Taylor has suffered loss in the form of lost remuneration for which she is entitled to an award of reimbursement.

[39] I am satisfied that Ms Taylor took more than reasonable steps to mitigate her losses. She has provided very convincing evidence of correspondence in respect of some 150 job applications. All too often Ms Taylor was told she was overqualified for the positions she made application for. For the period ending 28 November 2004, Ms Taylor earned \$742.67 net from temporary work.

[40] Ms Taylor describes quite a dire financial situation following her termination. She had to borrow money from her brother to meet her living expenses, mortgage and car payments. She said her friends fed her.

[41] She received an unemployment benefit as from November/December 2004. Prior to that time she was subject to a stand-down. She was paid a benefit of \$268.59 together with an accommodation supplement of \$164.16. She commenced new employment from 4 July 2005 as a Training and Process Specialist with BOC Gases.

[42] Ms Taylor seeks an award of reimbursement of \$22,500.00. I award her reimbursement in respect of the period from her termination until the commencement of her new employment on 4 July 2005 in the sum claimed of \$22,500.00. I award her what she has claimed being a lesser sum than I consider her to be entitled to. **I order the Centre for TPM Australasia PTY Limited to pay to Maureen Joy Taylor the sum of \$22,500.00 as reimbursement pursuant to section 128(3) of the Employment Relations Act 2000.**

[43] I am not persuaded that the circumstances of this problem call for any penalties against the Centre. Accordingly, I decline to exercise my discretion to order the same.

Costs

[44] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Ryan is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Eggleston is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe.

Leon Robinson
Member of Employment Relations Authority