Determination Number: AA 345/06
File Number: AEA 1298/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Tania Paterson (Applicant)
AND	Max G Limited t/a New World Remuera (Respondent)
REPRESENTATIVES	Nicholas Carter, Counsel for Applicant Paul Tremewan, Advocate for Respondent
MEMBER OF AUTHORITY	R A Monaghan
INVESTIGATION MEETING	17 October 2006
SUBMISSIONS RECEIVED	19, 25 and 30 October 2006
DATE OF DETERMINATION	15 November 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Tania Paterson was employed by Max G Limited, trading as Remuera New World ("MGL"), until her employment was terminated by reason of redundancy on 7 December 2005. She says she was unjustifiably dismissed and that the redundancy was not genuine.

[2] MGL says the redundancy was genuine and a fair process was followed in implementing it.

The parties' relationship

[3] Adrian Barkla is the director and a shareholder as trustee of MGL, which operates the Remuera New World supermarket. He had been Ms Paterson's de facto partner in the late 1990s, and a personal relationship continued from about mid-2000 – about the same time as MGL took over the operation of the Remuera supermarket. Mr Barkla even put Ms Paterson on the supermarket's payroll when MGL began the operation, although for a period of at least 12 months she did not work for the supermarket and continued in employment elsewhere.

[4] At the time, the supermarket used a manual system for checking that suppliers were invoicing it for goods correctly in accordance with arrangements negotiated from time to time between the parties. When MGL took over the operation of the supermarket the work was being done by an external contractor, but in or about September 2001 (or 2002 – the evidence was inconsistent on the point) the incumbent decided to end his contract. Mr Barkla offered the work to Ms Paterson, who accepted it and resigned from her employed position.

[5] No written employment agreement was entered into when this arrangement began. Ms Paterson merely remained on the payroll, was paid $760 per week, and completed the checking work when it was given to her. She was not required to attend the supermarket premises to carry out the work, and for the most part she did not do so. She had young children, and her preference was to work from home. Although I was told the work took 20-30 hours a week to complete, Ms Paterson also had the benefit of very flexible working hours.

[6] In or about August 2003, in association with personal negotiations with Ms Paterson regarding a property sharing agreement, Mr Barkla sought to complete a written employment agreement. No employment agreement was signed. Ms Paterson said she did not sign the document was because she was unhappy about the provisions concerning uniforms, holidays and notice. Mr Barkla said it was because she saw no need to sign, because of the personal relationship.

[7] Ms Paterson produced an employment agreement in which she was named as the employee party, and which recorded a commencement date of 2 April 2002. She said that was the document she was asked to sign, which in the circumstances seems likely. The agreement described Ms Patterson as a salaried employee receiving $760 per week, provided for a notice period of 4 weeks, and described Ms Paterson's position as 'office administration'. There was also a redundancy clause, which provided for two weeks' notice of termination in the case of redundancy. Finally, the agreement referred to the use of a motor vehicle, although as I discuss later the matter of the motor vehicle is referred to in proceedings in the family court.

[8] MGL produced another, shorter, document headed 'variation of employment contract', which it said was intended to address some of the special features of employment not present in the company's standard agreement. Ms Paterson denied seeing this document, and it was not signed. However since most of its brief contents are consistent with the practical arrangements discussed at the investigation meeting, I set the relevant provisions out as follows:

> "1. [job description]
> The employee shall be required to:
> (a) check weekly invoices against deals given by suppliers (at home)
> (b) check the accuracy of invoices (at home);
> (c) pick up and drop off weekly statement boxes and invoice boxes;
> (d) assist with stocktakes; and
> (e) assist with errands.
>
> 2. The hours of work shall be such hours as are required to achieve the tasks specified in the job description in a timely and efficient manner at the employer's discretion (with assistance where reasonably necessary).
>
> 3. …
>
> 4….
>
> 5. The Employee shall be entitled to obtain all her groceries from the employer at the employer's cost, provided all such groceries are scanned through the employer's check-out and signed for by the employee."

[9] The mere fact that neither document was signed does not mean the contents should be entirely disregarded. Rather the absence of signatures makes it more difficult to ascertain whether there was agreement on any particular disputed terms and conditions of employment. I can say that, whether or not Ms Paterson saw or signed the variation, it sets out some of the terms and conditions of her employment. They were not disputed and the parties observed them in practice. In particular the job description is accurate although the tasks listed at 1(d) and (e) above formed a very minor part of Ms Paterson's work. Those listed at 1(a) and (b) were her core activities, facilitated where necessary by 1(c). Clause 5, too, records the parties' practice at the time.

[10] In or about September 2003 Foodstuffs, the overall owner of the New World supermarket chain, introduced a fully electronic stock management system. The correct operation of the system would mean there was no further need to carry out manual checks of supplier invoices. However the Remuera supermarket was at sea with the system. Mr Barkla himself was unable to use it, and said no training was available. He said there was no-one in the Foodstuffs' head office whom he could approach for training, and no-one else in the supermarket who was familiar with or able to use the system. Mr Barkla allowed the matter to drift unresolved, and Ms Paterson continued her manual checking.

[11] During 2004 one of the supermarket's buyers learned the part of the system relevant to his activities, and Mr Barkla said in evidence that by April 2004 there was some 'getting to grips' with the system. Then in early 2005 Leslie Bernardo, the assistant to the office manager, began teaching the system to herself using manuals she inherited from a buyer, and later received some training from a buyer at another New World supermarket. The more Ms Bernardo used, and became familiar with, the system, the more she also began checking supplier invoices on it. Meanwhile no-one addressed Ms Paterson's position and she continued as before.

[12] By about September 2005 it had become apparent to Ms Bernardo and her manager, Gaye McIntyre, that the manual system was no longer necessary. Ms Bernardo was able to do the work in 3 – 4 hours per week. The two women discussed the matter with Mr Barkla. They concluded that Ms Bernardo would be able to absorb the duties into her own position, making Ms Paterson's position redundant. None of this was raised with Ms Paterson at the time.

[13] Unfortunately, in or about November 2004, Ms Paterson's and Mr Barkla's personal relationship had ended. By email message dated 31 October 2005 Ms Paterson's family lawyer threatened legal proceedings, and proceedings have since been filed in the family court. Mr Barkla reacted angrily, threatening to bar Ms Paterson from the supermarket.

[14] In an incredible display of poor timing, Mr Barkla chose November 2005 to begin to address with Ms Paterson the by then long-outstanding issue of the continuing need for manual checking of invoices. Inevitably Ms Paterson says her resulting redundancy was not genuine, rather Mr Barkla wanted her out of the supermarket after the end of the personal relationship.

[15] Mr Barkla did at least attempt to consult with Ms Paterson about her future at that point. At a meeting on 29 November 2005 he referred to the introduction of the electronic stock management system, explained the effect of the early lack of training in its use, and indicated there was no longer any need for Ms Paterson's role. Ms Paterson suggested she could still do the checking, but Mr Barkla replied that the existing office staff could carry it out without adding to their hours of work. The discussion became circular, with Mr Barkla advising there was no further need for manual checking, and Ms Paterson querying why she could not continue to do the work – whether manually or on the computer. The meeting ended with Mr Barkla making it clear there was no further need for Ms Paterson's position, and Ms Paterson taking the time to consider her response.

[16] At a further meeting on 5 December 2005 Ms Paterson advised that she wanted to be upskilled, and expressed the view that Mr Barkla was motivated by a desire to get rid of her. She was not prepared to abandon that view, and the discussion went nowhere.

[17] At a further and final meeting on 7 December 2005 Mr Barkla advised there were no other vacancies at the supermarket, and Ms Paterson again accused him of not wanting her at the supermarket. Mr Barkla confirmed she was being made redundant effective immediately, and would be paid one month's salary in lieu of notice.

[18] By letter dated 8 December 2005 Mr Barkla offered an additional and without prejudice payment of 8 weeks' pay as redundancy compensation. The letter said payment would be made upon the return of a Nissan motor vehicle and a laptop computer said to be company property.

[19] The payment has not been made and the property has not been returned. The parties are in dispute over whether the motor vehicle and the laptop were company property or property of Ms Paterson's. I was told the ownership of those items forms part of the proceedings in the family court. It was also pointed out that Mr Barkla has made conflicting statements about ownership. In those circumstances I do not consider it appropriate for a body like the Employment Relations Authority to determine that or associated matters in advance of the decision of the family court. Leave is reserved to refer matters concerning the motor vehicle and the laptop to the Authority after the court has issued its decision if necessary - particularly in the event the court finds the property is neither relationship property nor the personal property of Ms Paterson - or if the matter otherwise remains unresolved by the outcome of those proceedings.

Determination

[20] Ms Paterson's redundancy was challenged on the following grounds:

(a) the decision to make her position redundant was not genuine as it was made only as a result of her pursuing her legal remedies under the Property (Relationships) Act 1976;
(b) the genuineness of the redundancy is also called into question because, although there must have been alternative positions available at least over the Christmas period, none was offered;
(c) Ms Paterson was not consulted properly in respect of the redundancy; and
(d) the decision to make her position redundant was not genuine as it was motivated by, to put it colloquially, Mr Barkla's wish to 'get rid' of her.

[21] The notice period was also said to be inadequate.

1. The state of the parties' personal relationship as motivating factor

[22] I regard grounds (a) and (d) above as being closely related and deal with them together.

[23] I did not understand the mere termination of the personal relationship to have been advanced as a reason why the redundancy was imposed, and indeed the personal relationship ended some 12 months before the employment relationship. Not only that, it was abundantly clear that Ms Paterson's position of manual checker of supplier invoices had genuinely disappeared. The time required to complete the work had reduced very significantly because of the introduction of the electronic system, and I accept Ms Barnardo's evidence that she was able to incorporate the work into her own duties.

[24] The difficulty for MGL lies in the timing of Mr Barkla's decision to do something about the implications of that.

[25] Mr Barkla had allowed two years to pass since the introduction of the electronic system, some 18 months to pass since the Remuera supermarket had begun to 'get to grips' with the system, a little under a year to pass while Ms Bernardo began to learn and use the system, and at least two months to pass since the need for Ms Paterson's position had been discussed in the office. Some two weeks after the message from Ms Paterson's family lawyer, Mr Barkla purported to begin a consultation process concerning Ms Paterson's redundancy. I find it impossible to avoid the

conclusion that the event which precipitated his decision – finally – to address Ms Paterson's employment was the apparent escalation in the dispute associated with the breakdown in their personal relationship.

[26] While I accept Ms Paterson's position had disappeared, Mr Barkla's allowing the matter to drift unresolved for as long as he did meant not only is he the author of his own misfortune now, but the timing of the decision to resolve it is also unfair to Ms Paterson. The decision to act in mid-late November was prompted by Ms Paterson's threatened pursuit of legal remedies in the family court and the further deterioration in the parties' personal relationship.

2. Availability of alternative positions

[27] I am not persuaded there were alternative positions that could have been offered to Ms Paterson. There was no position in the office. Ms Paterson pressed Mr Barkla for the opportunity to 'upskill' on the computer, but the existing staff were already performing the necessary work and I do not accept an option of that kind was reasonably available. Nor, since Ms Paterson's duties were those affected, do I accept there were grounds on which to say she should displace any of the existing office staff.

[28] Ms Paterson also asserted that, given the time of year, there must have been vacancies for other positions in the supermarket. Mr Barkla said some students had been engaged pursuant to a standing arrangement, but otherwise there were no vacancies. Julie Prince, who had operated the Remuera supermarket until 2000 and is no longer engaged in the supermarket industry, supported Ms Paterson's assertion. However she did not assert any direct knowledge of her own regarding the existence of vacancies in the Remuera supermarket in late 2005, and her evidence did not assist.

[29] Thus I am not persuaded there were such other vacancies. Nor – given her employment background, the importance to her of working at home, and the state of her relationship with Mr Barkla – do I consider it likely Ms Paterson would have been willing to accept duties such as shelving, collecting trolleys or checkout assistance had they been offered. She said at the investigation meeting that she needed the money because it was Christmas, but in all of the circumstances I did not find that convincing.

[30] Accordingly, nothing in the issue of availability of alternative positions calls into question the justification for the dismissal.

3. The adequacy of consultation

[31] I regard the consultation process of November and December 2005 as amounting to no more than going through the motions. As I have indicated, that is not because I consider there remained a position for Ms Paterson, or that consultation could have changed the fact that the electronic stock management system had rendered unnecessary the manual checking Ms Paterson had been carrying out. Rather, a far earlier engagement with Ms Paterson over the introduction of the electronic system was called for. There was no such early engagement, and when Mr Barkla finally took action he was prompted to do so by developments in his personal dispute with Ms Paterson.

4. The notice period

[32] Ms Paterson received one month's pay in lieu of notice. This was said to be inadequate, and it was submitted on Ms Paterson's behalf that a reasonable period of notice to be implied into her employment agreement was four months.

[33] As I have recorded, an employment agreement put to Ms Paterson for her signature contained both notice and redundancy provisions. I consider self-serving Ms Paterson's statement of her reasons for not signing the agreement. At the same time I am not persuaded there was a meeting of the minds over the content of the redundancy provisions or that any notice period was agreed. There was no other evidence to suggest such a meeting of the minds. Accordingly the necessary terms must be determined by implication.

[34] Regarding the wider law about implying the terms of a notice period in an employment agreement, the following decision of the High Court is of some assistance:

> "The plaintiff was entitled to reasonable notice. What is reasonable notice is to be determined by the circumstances of the case at the time the notice is given. The decision in other cases can be no more than a guide. The authors of … have provided a convenient list of factors which have been regarded as relevant by the courts. They include factors relevant to the job such as the duration of the hiring, industry practice, the grade of the employment, the importance of the position, the size of the salary, the nature of the employment and factors which pertain to the employee such as the length of service, his professional standing, his age, his qualifications and experience, the degree of job mobility, what he may have given up to come to his employer and his prospective pension and other rights."[1]

[35] When there is a redundancy situation, the Court of Appeal has said:

> "A just employer, subject to the mutual obligations of confidence, trust and fair dealing, will implement the redundancy decision in a fair and sensitive way. … Where the contract is silent as to the redundancy notice period and payment in lieu, the contractual period for terminating on notice and in the absence of any contractual provisions the common law requirement of reasonable notice in the circumstances, may help in striking a balance between employee and employer, but modified to recognise that the employment is being terminated in a redundancy situation …"[2]

[36] The Court of Appeal also commented that the evidence in front of it did not support a general practice of providing more than one month's notice, returning in a later judgment to discuss the matter as follows:

> "[31] In determining what is reasonable notice at common law, in the present circumstances, the starting point is that there is no evidence to indicate that common practice in employment agreements in relation to required notice of redundancy is other than that identified in **Aoraki Corp**, … the Court did not say reasonable notice at common law might not exceed one month. It all depends on the relevant circumstances. ..
>
> [32] In deciding whether the circumstances justify notice beyond prevailing practices it is also necessary to consider if they reasonably warrant a longer period to address the situation. …"[3]

[37] Here Ms Paterson's position involved basic clerical tasks, and she was neither a senior nor a long serving employee. I do not include in her relevant period of service that period during which she was on the payroll but not required to work. In general there is nothing in the reported cases to justify implying a notice period in excess of one month in respect of that kind of position. The only question is whether 'in the circumstances' - namely the termination of employment by reason of redundancy and shortly before Christmas - a longer period of notice should have been given as a matter of fairness.

[38] The reality of the Christmas shutdown period in New Zealand is still that Ms Paterson's chance of obtaining work between 8 and 22 December, to start on or before a notional one month's notice period ended in early January, was probably low. In that kind of redundancy situation, an extra four week cushion by way of notice would have been fair.

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[1] **Joyce v Mutual Rental Cars Limited** (1990) 3 NZELC 97,669, at 97,674
[2] **Aoraki Corporation v McGavin** [1998] 1 ERNZ 601, 618
[3] **Charta Packaging Limited v Howard** [2002] 1 ERNZ 10, 19

5. Conclusion

[39] I conclude the dismissal was unjustified because Ms Paterson was not treated fairly, on the grounds I have set out. Ms Paterson has a personal grievance.

Remedies

[40] Ms Paterson seeks the reimbursement of remuneration lost from the date of termination of employment to the date of this determination.

[41] However her position had disappeared. The only loss of remuneration to which she is entitled is the loss flowing from her personal grievance, which in turn flows from the deficient way in which Mr Barkla addressed the disappearance of the position. In the context of remuneration, and with reference to my finding concerning notice, that amounts to the loss of a further four weeks' pay in lieu of notice. MGL is accordingly ordered to pay to Ms Paterson the sum of 4 x $760 = $3,040 (gross).

[42] Although not mentioned in the statement of problem or the correspondence in which her grievance was raised, Ms Paterson seeks reimbursement in respect of a grocery allowance she says she was paid as part of her employment agreement. The parties' arrangement in that respect was originally as set out in the document quoted from at [8] above. By further agreement, in the period prior to the termination of Ms Paterson's employment the allowance was paid in the weekly sum of $250. If, as he seemed to be saying, Mr Barkla did not intend that payment to form part of the employment agreement, the documents and the practice between the parties indicate otherwise. I treat the payment as a benefit of Ms Paterson's employment.

[43] That benefit was lost to Ms Paterson as a result of her personal grievance. She is therefore entitled to compensation in respect of the loss. Her final pay calculation indicates the payment was not incorporated in the payment in lieu of notice. Thus she has lost the allowance in respect of the notice period, as well as the extended notice period as I have determined it. That loss is quantified as 8 weeks x $250 = $2,000.

[44] Regarding the injury to Ms Paterson's feelings, I do not accept counsel's submission that the only evidence took the form of 'unchallenged' assertions contained in Ms Paterson's written statement of evidence. During the investigation meeting Ms Paterson referred frequently and with feeling to other setbacks she experienced during 2005, as well as to the circumstances of the termination of her personal relationship with Mr Barkla. Some of her anger was also caused by her view that her position was not genuinely redundant, when it had genuinely disappeared. I view the termination of her employment as aggravating existing injury to feelings, not creating the injury.

[45] Overall it is the effect of the manner of the termination of her employment for which compensation can be sought. The termination came as a bolt from the blue, in circumstances when the position could have been addressed up to two years earlier.

[46] Bearing these factors in mind, I order MGL to pay to Ms Paterson the sum of $4,000 as compensation for injury to her feelings.

Summary of orders

[47] MGL is ordered to pay to Ms Paterson the sums of:

(a) $3,040 as reimbursement of earnings lost as a result of the personal grievance;

(b) $2,000 as reimbursement of a benefit lost as a result of the personal grievance; and
(c) $4,000 as compensation for injury to feelings resulting from the personal grievance.

Costs

[48] Costs are reserved.

[49] The parties are invited to reach agreement on the matter. If they seek a determination from the Authority they shall have 28 days from the date of this determination in which to file and serve memoranda on the matter.

R A Monaghan
Member of Employment Relations Authority