

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 118
5331831

BETWEEN JUNE ISABELLE HYNES
 Applicant

AND THE HOME CENTRE LTD t/a
 MARLBOROUGH MITRE 10
 MEGA
 Respondent

Member of Authority: M B Loftus

Representatives: Stephanie Moss, Counsel for the Applicant
 Peter Zwart, Advocate for the Respondent

Investigation Meeting: 31 August 2011 at Blenheim

Submissions Received: At the investigation meeting

Determination: 13 June 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms June Hynes, claims to have been unjustifiably dismissed by the respondent, the Home Centre Limited (the Home Centre), on 11 August 2010.

[2] The Home Centre accepts it dismissed Ms Hynes, but contends the dismissal was a substantively justified redundancy and that the process was fair.

Background

[3] Ms Hynes commenced employment with the Home Centre in January 2008. The position she originally occupied was declared surplus during 2009 but Ms Hynes avoided redundancy by being redeployed to a sales position in the seasonal department (otherwise known as Sector 2).

[4] Ms Hynes says that on 9 August 2010 and towards the end of the working day, Ms Pam Allen-Baines (the Home Centre's human resources and development

coordinator), asked to speak to her. She was handed a letter entitled “*Proposed restructure of retail*”. It advises:

As you are aware, Retail has been very slow over the past few months in regards to customer count and purchases. As winter is upon us, we can presuppose that the usual downturn of sales will continue.

Considering this information, it has led us to consider restructuring the Retail aspect of our store; including the option of disestablishing 120 hours of the 1104.50 hours per week of Retail Sales staff in order to meet our Wage to Sales ratio goals. Sectors 2 & 3 were specifically identified as departments with high Wage to Sales ratios. To identify positions that could be made redundant, we have adopted a selection criteria based on similar criteria to that used in the standard Performance Reviews, with 3 independent members of the Management Team both applying the criteria to all permanent Sales staff. Your rating is described in the table below. Unfortunately, if this criteria is adopted yours would be one of the three positions to be made redundant.

This is a mere proposal and is subject to our obligation to consult with you...

[5] The letter goes on to suggest a meeting time the following afternoon. It advises Ms Hynes she could bring a support person if she wished before stating:

This consultation meeting will include, but will not be limited to:

1. *The proposal to make your role as Sales Team Member redundant*
2. *The selection criteria adopted and your subsequent rating*
3. *The consequences for you*
4. *Redeployment options– none currently available*
5. *The consultation process and timelines*

[6] Attached was a table showing the reviewer’s ratings of Ms Hynes. She was not advised of the ratings attained by other affected staff.

[7] Ms Hynes attempted to seek representation but was unsuccessful. She then chose to attend the meeting by herself.

[8] Present were Ms Hynes, Ms Allen-Baines and Mr Graeme Hawtin, the Home Centre’s managing director. Ms Hynes says that the meeting took about 20 minutes. She says she asked the identity of the reviewers but only one was identified - Ms Allen-Baines, who identified which were her ratings. Ms Hynes does not say much in her brief of evidence about the meeting other than to allege *it was apparent that they knew who they were going to make redundant.*

[9] Ms Hynes goes on to say:

j. I went to work the following day as normal, it was a difficult and stressful time waiting to be called to the office. In the end I contacted Pam and asked her if a decision had been made. I was informed that Mr Hawtin was not at work and she had to wait until he arrived.

k. About half an hour later Pam called me to her office. She asked me if the other two staff members could be present. I agreed that they could.

l. My position was made redundant as were the other two staff members present. Pam offered to escort us out of the building; I sort of laughed and said no thanks. Pam then told me I had to leave the building directly – do not talk to anyone on the way out. I left the building but did say goodbye to some of my friends.

[10] Ms Hynes adds that she was unable to work out her notice period.

Determination

[11] As has already been said, the Home Centre accepts that it dismissed Ms Hynes. In doing so, it also accepts it is required to justify the dismissal.

[12] Section 103A of the Employment Relations Act 2000 (the Act) states, or at least did state, that the question of whether a dismissal is justifiable

... must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal ... occurred.

[13] That test is used as Ms Hynes was dismissed before the now current test came into force on 1 April 2011. Section 7 of the Interpretation Act 1999 provides *An enactment does not have retrospective effect*. Section 4 makes it clear that all enactments are subject to the Interpretation Act 1999 unless the enactment provides otherwise. Given there is no suggestion in the Act that the new s.103A has retrospective effect, it is the earlier test that must apply.

[14] It is well established that:

When reviewing an employer's decision to make employees redundant, the Authority or Court will generally look at two initial factors: the genuineness of the redundancy; and whether the dismissal was carried out in a procedurally fair manner.

In Coutts Cars Ltd v Baguley [2001] 1 ERNZ 660; [2002] 2 NZLR 533 (CA), the Court of Appeal in reviewing the approach of the Employment Court decision (Baguley v Coutts Cars Ltd [2000] 2

ERNZ 409) emphasised the need to consider the two factors (genuineness and process) separately ...
Kevin Leary (ed) *Employment Law* (looseleaf ed, Brookers) at ER103.17

[15] Mr Zwart's submission in respect to the substantive justification reads:

It is the employer's clear and primary submission that the redundancy was genuine and justified on the basis of the economic position of the company at the time that the decision was made. The employer provided clear and undisputed evidence of the reasons for the redundancies. The redundancy of June Hynes was only one of a large number of similar cutbacks going back over a period of a couple of months. Redundancies had been accompanied by other cutbacks including reduced hours and days and remuneration. The redundancy was part of a programme to move the company wage costs to a level of commercial viability.

[16] I cite the submission as I consider it accurately reflects the content and strength of the evidence proffered in substantive support of the decision to reduce staff. That evidence was unchallenged by either questioning or in submission and I note Ms Hynes herself accepted, when answering questions, that:

- i. she knew trade was in decline;
- ii. there had been numerous staff discussions where management sought suggestions and feedback about ways of addressing their concerns. She adds there was little feedback as staff were upset and had no idea how to address the situation;
- iii. some had already been made redundant, while others had agreed reduced hours;
- iv. she herself had discussed a reduction of hours but that her personal situation was such that it was not a viable option for her;

[17] The evidence convinces me the Home Centre found itself in a position where it had to address the situation before it found itself in an untenable situation. The decision to make staff redundant at this time was, I find, substantively justifiable.

[18] As already indicated, Ms Hynes did not challenge the substantive justification. The challenge is procedural, and this is evidenced by the submissions. Therein it is stated:

It is very clear that in order for redundancies to be lawful they must not only be substantively justified but procedurally fair. The process adopted by the respondent was not open and transparent and therefore not procedurally fair.

[19] Ms Hynes complaints are enunciated. They are that:

- i. Consultation was inadequate and notice deficient;
- ii. The outcome was predetermined in that Ms Hynes was selected for redundancy prior to any consultation; and
- iii. The selection process was deficient due to the anonymity of the reviewers and there was considerable variation in the grades each awarded.

[20] That consultation is required is confirmed by Section 4(1A) of the Employment Relations Act 2000 (the Act). It demands that an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of an employees employment give the employee access to relevant information and an opportunity to comment employer before the decision is made.

[21] Ms Hynes contends the consultation was inadequate and the outcome predetermined. I can not agree. I reach that conclusion for the following reasons. A consultation process must start somewhere. This started with the letter of 9 August. It clearly states it contains a *mere proposal*. It then lists five issues the Home Centre wished to discuss, while making it clear the list was not exhaustive – Ms Hynes could raise other issues. Included in the five were the overall proposal and the selection criteria. It also included the consultation process and timelines.

[22] Witnesses for the Home Centre made it clear that the offer of consolation was genuine and they were open to any suggestions Ms Hynes may have made. That evidence went undisturbed under questioning while answers given by Ms Hynes would indicate it was she who truncated the process. She accepts she *could have put it off but didn't think it would make much difference*. She also stated that she saw no point in delaying the inevitable and accepts it was she who approached Ms Allen-Baines the following day seeking a decision forthwith.

[23] Given that evidence I can not blame the Home Centre for a truncated process, if indeed it was. Section 4(1A) requires that they give an affected employee *an opportunity to comment*. They did, through the letter and the invitation to provide feedback. It was Ms Hynes who reached a conclusion about the outcome, chose not to actively participate and then sought an immediate decision.

[24] Ms Hynes also complains that she had insufficient notice of the meeting. That I discount. She did not raise a concern at the time. She chose to attend and once again I note her evidence that she had concluded the situation was such that she was going and she just wanted to get it over with.

[25] There is then the claim the outcome was predetermined and Ms Hynes had been selected prior to the meeting. Again I refer to the fact the selection process and Ms Hynes grades were open for discussion. Indeed it is her evidence that she did suggest ‘first on – last off’ but then accepted that it would not have made any difference – she would still have been selected under that criteria. I also note that while she now challenges the grades she accepted, when answering questions, that at the time the chair and attendant discussion *sold it* [her selection for departure] *to me*. She also accepts that redeployment options were limited, perhaps non-existent, as a number of positions required specialised knowledge and skills.

[26] In respect to the grades she claims unfairness due to the anonymity of the reviewers and some disparity in the grades. The anonymity I discount. First, it is disputed. Ms Allen-Baines states that while she did not give the names she did identify the positions they occupied. That evidence was not challenged and Ms Hynes stated, when giving an overview of the meeting, *my brain was not working well*. Her evidence exhibited some uncertainty as to what occurred in the meeting and I must prefer Ms Allen-Baines evidence in this respect. In any event I doubt it would have made a difference. At the investigation Ms Hynes accepted that knowing their identity would not have made a difference and neither of the allegedly unidentified reviewers *had a snitch on me*.

[27] Similarly there is some disparity in the grades the three awarded her. These were discussed at some length in the investigation with Ms Hynes accepting, under questioning, that they were not of sufficient import to have made a difference. Notwithstanding the fact it was an average that was compared, she accepts (albeit with the benefit of hindsight in the investigation – she did not have the relevant

information at the time) she would still have been selected if the Home Centre had compared her best result (with which she has no complaint) with the worst of other potentially affected staff. Again, I conclude the relevant point is Ms Hynes was given a chance to discuss and challenge the process and grades. She chose not to take it at the time.

Conclusion

[28] I have concluded that the Home Centre had a substantive justification for the decision it made but in any event, this challenge was procedural. For the reasons above, I have discounted the specific procedural challenges mounted by Ms Hynes and conclude that the Home Centre has fulfilled the procedural obligation imposed by s.4(1A) of the act. It gave Ms Hynes an opportunity to comment and influence its decision – at the time she chose not to avail herself of that opportunity.

[29] Ms Hynes has failed to establish she has a personal grievance and her application therefore fails.

[30] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority