IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 294
5366986

	BETWEEN	MONIQUE BODE-PATTERSON Applicant
	A N D	MARGARETA HAMMOND-SMITH and KEVIN SMITH t/a I LOVE MERINO LIMITED Respondents

Member of Authority:	K J Anderson
Representatives:	W Reid and R Rolston, Advocates for Applicant M Beech and E Smith, Counsel for Respondents
Investigation meeting:	19 February 2013 at Tauranga
Submissions Received:	14 March 2013 and 4 April 2013 for Applicant 2 April 2013 for Respondents
Date of Determination:	10 July 2013

DETERMINATION OF THE AUTHORITY

Introduction

[1] The applicant, Ms Monique Bode-Patterson, claims that she was unjustifiably dismissed on 14 November 2011. She asks the Authority to find that she has a personal grievance and award her the remedies of reimbursement of lost wages and compensation.

[2] The respondents, Mrs Margareta Hammond-Smith and Mr Kevin Smith, trading as I Love Merino Limited, deny the claims of Ms Bode-Patterson and say that her dismissal was as the result of a genuine redundancy and hence the applicant does not have a personal grievance.

Background

[3] Ms Bode-Patterson commenced her employment on 21 March 2011 as a sales person for a business called I Love Merino Limited[1] (the business) located in Mount Maunganui. The owner/operators of the business, and the directors of I Love Merino Limited, are Ms Margareta Hammond-Smith and Mr Kevin Smith (the Smiths). They are experienced business people having been in the retail industry for more than thirty years.

[4] Ms Bode-Patterson was employed on a permanent part-time basis; working approximately 30 hours each week, along with another sales person, Ms Judy Gibson-Patmore, who also worked the same weekly hours.

[5] The evidence is that the employment relationship, which was only for a quite short period (just over of 7 months) was amicable and a social relationship also developed. Regrettably, all this was destined to change as has been revealed by the litigation before the Authority.

Redundancy

[6] The evidence of Mr Smith is that in late 2011, the business was facing financial uncertainty due to a combination of factors; including the global credit crunch, the grounding of the ship *Rena* and the impact of the PSA disease on the kiwifruit industry. Hence, trading conditions in Tauranga/Mt Maunganui were difficult and the business was affected in regard to sales. Mr Smith says that Ms Bode-Patterson and Ms Gibson-Patmore were aware of the decrease in trading for the business and the summer trading figures were discussed daily along with how the figures were not meeting expectations.

[7] On 15 October 2011, the accountant for the business (Mr McDougall) wrote to Mr Smith and Mrs Hammond-Smith. In this letter, Mr McDougall informed that the GST return "to September 2010" (presumably this should be September 2011) had just been completed. Concerns were expressed about the level of trading and Mr McDougall informed that a review of the trading results for a full 12 month period revealed that:

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[1] The evidence of Mr Kevin Smith (and the submissions for the respondent) state that Ms Bode-Patterson was employed by the company: I Love Merino Limited; albeit the employment agreement cites Margareta Hammond-Smith and Kevin Smith as the "Employer".

> 1. The gross profit percentage on what you are selling is lower than was achieved in Dunedin.[2]
>
> 2. The turnover is lower. The August turnover was about 77% of the average spanning the four months from April to July and September was 53% of the same four month period.
>
> 3. You have a fixed cost structure rather than a variable structure.

[8] Mr McDougall suggested that it was time to review the business structure. The letter from Mr McDougall concluded by stating:

> I would be grateful if you could look at all spending to see if a more appropriate cost model can be implemented that is responsive to variable trading conditions. Please ring me to discuss options.

[9] After assessing the content of Mr McDougall's letter, the Smiths met with him on 2 November 2011. An outcome of this meeting was that a decision was made to reduce the costs of the business by consolidating the two part-time positions (held by Ms Bode-Patterson and Ms Gibson-Patmore) into one full time position. Mr Smith says that this decision was made on the basis that it was "cheaper" to employ one person full-time than to pay two part-time employees and that the current arrangement was no longer sustainable. However, there is no evidence before the Authority in regard to how the labour costs were calculated.

[10] On Monday, 7 November 2011, at the end of the trading day, Mr Smith met with Ms Bode-Patterson and Ms Gibson-Patmore. The evidence of Ms Bode-Patterson is that Mr Smith told them that a "question of business hardship" might be arising and that the books of the business were not as good as he had thought. Ms Bode-Patterson says that the discussion took place at the front of the shop in full view of the public. Mr Smith says that he met with the two women at the back of the shop. I prefer the evidence of Mr Smith as to the time and location of the discussion; but in any event, it is established that this was a discussion that no other person was privy to.

[11] The outcome of what seems to have been a quite brief discussion was that the two women were given a letter dated 7 November 2011; signed by the Smiths. In summary, the letter explains that the sales and expenses of the business had been

[2] The Smiths had traded for a number of years in Dunedin before opening their shop at Mt Maunganui.

reviewed and that consideration had been given to a number of matters that impacted on the business, including:

- The decline in sales volumes over measurable and comparable periods;
- The lessening demand locally for fashion products due to the continued impact of the economic crisis;
- The economic uncertainty being caused by the domestic economy by the impending general election; and
- The potential for a major reduction in international tourist and visitor numbers caused by the *Rena* shipwreck.

[12] The letter continues:

> These are all factors which give us much cause for concern. Concern not only for ourselves and the future of our business, but concern for a secure future that we might or might not be able to offer our staff.
>
> It is after much deliberation, and with regret, that we have reached a decision that because of the factors discussed, we can no longer maintain our current staffing levels.
>
> In fairness to all staff and their futures, we feel bound to advise you immediately of these deliberations and the outcomes.
>
> We have been forced to disestablish both current sales-person positions. However, we will attempt to maintain one permanent full-time position and we invite you to apply for that one position we feel we can maintain. We will be making the same offer to your current work colleague.
>
> We propose that the current common job description, terms and contract under which you are currently employed, be extended to this newly established availability of position.

[13] The letter informs that should Ms Bode-Patterson wish to apply for the one full-time position, she should submit a resume and written application to be delivered by close of day on Friday, 11 November 2011. The same information was conveyed to Ms Gibson-Patmore. However, there is no information provided about when a final decision would take effect.

The response of Ms Bode-Patterson

[14] The evidence of Ms Bode-Patterson is that she attended work as usual the next day (Tuesday, 8 November 2011) and at about 11:00a.m. she made a phone call to Mrs Hammond-Smith who was at home because of a scheduled operation on a foot. Ms Bode-Patterson says that she proposed to Mrs Hammond-Smith that she and Ms Gibson-Patmore could job share on the basis of 20 hours each week, as compared with the current 30 hours per week. This would enable both women to retain their employment and a reasonable income while reducing the wage costs for the business.

[15] Ms Bode-Patterson attests that this proposal was "immediately dismissed" by Mrs Hammond-Smith because the wages cost would still be more than the business was prepared to pay.

[16] The evidence of Mrs Hammond-Smith is that there never was a discussion with Ms Bode-Patterson on 8 November 2011. Ms Hammond-Smith says this was because due to the operation that she had on her foot on Monday, 7 November, she was on pain medication and had turned her phone off. Mrs Hammond-Smith says that there was a conversation about job sharing arrangements when the Smiths returned from meeting with their accountant. However, the evidence of Mr Smith is that his wife did receive a call from Ms Bode-Patterson as she has attested. Just why Ms Hammond-Smith attested otherwise has not been credibly explained.

[17] The further evidence of Ms Bode-Patterson is this:

> *On the morning of 9 November I was severely depressed about what was happening at work and I attempted to commit suicide. I attended work but was unwell therefore phoned from the shop,*[and] *made an appointment to consult with my doctor. I am aware that my co-worker overhead my conversation and must have passed this information to Margareta as she subsequently sent a text message to me the next day referring to my health and that I was about to see my doctor on Friday morning.*

[18] This evidence is quite extraordinary in that Ms Bode-Patterson asks the Authority to accept that she attempted to commit suicide because of "what was happening at work" but still attended the workplace as normal. While the Authority is not required to make a finding about the credibility of this particular evidence, I suspect that Ms Bode-Patterson is rather inclined toward presenting a melodramatic version of events at times.

[19] On Thursday 10 November 2011, Ms Bode-Patterson came to work as usual. She attests that she had conferred with her friend. Mr Fred Buijn, and he assisted her in regard to matters relevant to the changes taking place at I Love Merino. The evidence of Ms Bode-Patterson is that she and Mr Buijn had prepared a handwritten letter for the Smiths that expressed the view that not enough time had been allowed for her to prepare her CV and application for the full-time position. However, Ms Bode-Patterson did not give the Smiths any indication that there was a problem with the timeframe when she was at work on Tuesday, 8 November, Wednesday, 9 November and Thursday, 10 November 2011.

[20] Ms Bode-Patterson says that on Friday, 11 November she was unwell to an extent that "alarmed" her. Ms Bode-Patterson attests that she attended her doctor at 8.15a.m. She says that this would have enabled her to then commence work at the usual starting time of 10:00a.m. But the opinion of the doctor was that Ms Bode-Patterson should not attend work that day or over the weekend, with a reassessment of her condition to occur on Monday, 14 November.

[21] Ms Bode-Patterson did not attend work on Friday 11 November 2011. Rather, Mr Buijn delivered to Mr Smith a doctor's certificate that informed that Ms Bode-Patterson was unable to attend work for that day and would be fit to return to work on Monday, 14 November 2011. There is no information on the certificate about why Ms Bode-Patterson was unable to attend work or indeed any mention of her being unwell; presumably this was to be inferred simply from the existence of the medical certificate.

[22] However, of more relevance is that along with the medical certificate, Mr Buijn delivered a handwritten letter over the name of "Monique Patterson" but this does not appear to be her signature when compared with her signed employment agreement, but not much rests on that.

[23] The letter is addressed to the Smiths and Ms Bode-Patterson conveys that she was "surprised and upset", for the Smiths, to learn that the business is not going as well as they had hoped. Ms Bode-Patterson continues:

> As a friend and employee I really sympathise with your situation.

[24] However, Ms Bode-Patterson expresses her surprise that the Smiths feel that there is a need to restructure the business via a reduction in staff. Ms Bode-Patterson states that:

> To this point I have been given no indication of the situation or been included in any discussions on this matter.

[25] Ms Bode-Patterson expresses her view that the business was successful and then informs:

> Furthermore, I am upset and unhappy at the timeframe given to me to reapply for my position. To be given four working days to both come to terms with this situation and compose a considered application letter with CV, is in my view grossly unfair and unreasonable. I therefore feel, having taken advice from others, that a more equitable and fair approach would be to postpone this process until Friday the 25 November 2011. This would give me a more reasonable time period to compose the application letter and curriculum vitae. It would also allow further discussions of this matter should you both be disposed to doing so. Thank you for your attention to this matter.

[26] Mr Smith confirms that he received the letter and medical certificate from Mr Buijn. It is also established that there was little or no discussion between the two men. The evidence of Mr Smith is that because it was considered that the timeframe allowed for the application for the full-time position was reasonable, the extension sought by Ms Bode-Patterson was not agreed to. Mr Smith also says that Ms Bode-Patterson never raised the matter of the timeframe being unreasonable, nor did she seek an extension of such during the three days (Tuesday, Wednesday and Thursday) that she was at work that week.

Termination of employment

[27] Ms Bode-Patterson came to work as usual on Monday, 14 November 2011. Her evidence is that Mr Smith approached her, put an arm around her shoulder and said: "… *sorry you didn't apply for the job so we gave it to Judy* [Gibson Patmore]*"*. Ms Bode-Patterson says that she was given a cheque for wages for the previous week and a second cheque for two weeks' pay (in lieu of notice) and her holiday pay. Ms Bode-Patterson attests that she was "denied" any opportunity of speaking. However, Mr Smith says that he informed Ms Bode-Patterson that she was to be made redundant and that she accepted this and she did not ask him to reconsider the decision. Mr Smith attests that Ms Bode-Patterson asked him not to "rubbish" her

name around town and he explained to her that the decision was purely a business matter, and a reference would be provided if she requested such. Ms Bode-Patterson also attests to telling Mr Smith that she provided him with a letter on the previous Friday and she told Mr Smith that she did not know how he could "do this". But there was no point in talking further as Mr Smith had obviously made his mind up and she said that she would just take the cheques and go. Mr Smith asked for the shop key and walked Ms Bode-Patterson to the door. Ms Bode-Patterson stated that she noticed that Ms Gibson-Patmore reported for work whilst the termination of her employment was being carried out.

[28] Ms Bode-Patterson claims that the disestablishment of her part-time sales position was not for genuine economic reasons. But even if the respondent is able to successfully defend that allegation, she says that there was a failure by the Smiths to adequately consult with her before the decision to disestablish her position was made. Finally, it is argued that while Ms Bode-Patterson should have been given an extension of time to prepare her application for the full-time position, it really does not make much difference one way or the other because, it is alleged, the Smiths had already pre-determined that Ms Bode-Patterson was not going to be appointed to the full-time position and hence the invitation to apply for the full-time job was simply "an elaborate charade" and that it had already been decided that Ms Bode-Patterson was not going to be retained.

Analysis and conclusions

[29] It has been established by the Court of Appeal, and very recently confirmed by the Employment Court, in *Rittson-Thomas t/a Totara Hills Farm v. Davidson* [3] and *Brake v. Grace Team Accounting Ltd* [4] that:

> An employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, reorganisation or other cost saving steps, no matter whether or not the business would go to the wall. A worker does not have a right to continued employment if the business can be run more efficiently without him.[5]

[30] The Court of Appeal in *Hale* held that:

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[3] [2013] NZEmpC 39
[4] [2013] NZEmpC 81
[5] *GN Hale & Son Ltd v. Wellington etc Caretakers etc IUOW* [1990] 2 NZILR 1079

> When a dismissal is based on redundancy, it is the good faith of that basis and the fairness of the procedure followed that may fall to be examined on a complaint of unjustified dismissal.

[31] And then, in a discussion about the statutory concept of unjustified dismissal, Richardson J stated that:

> The statutory concept of unjustified dismissal is concerned with both the reason for the dismissal and the manner in which it was handled; with the substantive justification and with procedural fairness.

[32] The entitlement of an employer to make a business more efficient was also confirmed by the Employment Court in *Simpsons Farm Ltd v. Aberhart* [6] in that:

> So long as an employer acts genuinely and not of our ulterior motives, a business decision to make decisions or employees redundant is for the employer to make and not for the Authority or the Court, even under section 103A.[7]

[33] In *Rittson-Thomas* the Chief Judge of the Employment Court explained what was intended by his dicta in *Simpsons Farms* regarding the application of s.103A; thus:

> [48] In *Simpsons Farms* I said that I did not understand Parliament to have intended the principles stated by the Court of Appeal in *GN Hale & Sons Ltd v. Wellington Caretakers IUOW* to be affected when it enacted the Employment Relations Act and, in 2004, section 103A in particular. That statement may be interpreted to say that an employer only has to persuade the Authority or the Court that the decision to declare a position redundant (and, thereby, to dismiss the holder of that position) was a genuine business decision in the sense that it was not a charade dismissal for other motives. That, in turn, has resulted in employers presenting evidence to this effect and then submitting that the Authority or the Court is not entitled to inquire further into the decision if it is satisfied that business reasons were the true ones for the dismissal. If that has been taken from what I wrote in *Simpsons Farms*, it was not what was intended. Readers of my judgment in that case will note that after making those remarks about *GN Hale*, I did then apply a section 103A analysis to the employer's decision to dismiss the grievant in that case and did not simply accept the assertion that it was a genuine business decision.

[34] Chief Judge Colgan confirmed the established law, as it applies to a decision by an employer to restructure a business, thus:

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[6] [2006] ERNZ 825
[7] Employment Relations Act 2000

> As has been the law since *GN Hale* in the Court of Appeal, it is still not for the Court (or the Authority) to substitute or impose its business judgment for that of the employer taken at the time.[8]

[35] And then enlarging on the application of s.103A in a redundancy setting, the Chief Judge stated:

> [52] But, that said, the Court cannot ignore the statutory refinements to the law of justification in personal grievances effected, first, with section 103A in 2004 and, subsequently, with the amendments to that section made in 2010. For the purposes of this statement of principle, both versions of section 103A are materially indistinguishable. In other words, it does not matter whether a "would" or "could" test is applied.
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> [53] Section 103A does require the Court [Authority] to inquire into a decision to declare an employee's position redundant and to either affect the holder of that position to his or her disadvantage or to dismiss that employee, if the personal grievance alleges that these acts by the employer were unjustified. The statutory mandate does not, however, go as far as the Labour Court did in *GN Hale*, that is to substitute the Court's (or the Authority's) own decision for that of the employer. Rather, the Court (or the Authority) must determine whether what was done and how it was done were what a fair and reasonable employer would (now could) have done in all the circumstances at the time. So the standard is not the Court's (or the Authority's) own assessment but, rather, its assessment of what a fair and reasonable employer would/could have done and how. Those are separate and distinct standards.
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> [54] It will be insufficient under section 103A, where an employer is challenged to justify a dismissal or disadvantage in employment for the employer simply to say that this was a genuine business decision and the Court (or the Authority) is not entitled to enquire into the merits of it. The Court (or the Authority) will need to do so to determine whether the decision, and how it was reached, were what a fair and reasonable employer would/could have done in all the relevant circumstances.
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> [55] It may be seen that the enactment of the Employment Relations Act and, in particular section 103A in 2004 and as amended in 2010, did affect the previous law about justifications for dismissal on grounds of redundancy but not to the fundamental extent of setting aside everything that the Court of Appeal propounded in *GN Hale.*

[36] Therefore, as set down by *GN Hale* and now confirmed by the Employment Court more recently in *Rittson-Thomas* and *Brake*, an employer is entitled to make their business more efficient by the introduction of cost saving steps, including reducing the number of employees engaged. But where an employee challenges the

[8] At [51]

justification for a dismissal, the law requires the Authority to determine whether the decision that was made and how it was reached, was what a fair and reasonable employer could have done in all the circumstances that existed at the time.

The circumstances that existed at the time

[37] As set out above, it is established (and accepted in the submissions for Ms Bode-Patterson) that the Smiths were entitled to make their business more cost efficient. And on the evidence before the Authority, it is reasonably established that for various reasons related to a number of factors influencing the local business climate at the time, the Smiths needed to address the cost structure of the business. A decision was made that instead of paying two part-time employees (Ms Bode-Patterson and Ms Gibson-Patmore) to work for 30 hours each a week (a total of 60 hours) it would be more cost efficient to have only one full-time employee and that both employees would be given the opportunity to apply for the new role. Notwithstanding that there is no evidence before the Authority about how the costs were calculated, it has to be accepted that this was a business proposal that the Smiths were entitled to pursue.

[38] However, before making a final decision to implement the business proposal, there was an obligation on the employer to properly consult with the employees as required by the good faith provisions of s.4 of the Employment Relations Act 2000 (the Act); in particular, subsection 1A (c). This requires that where an employer is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of one or more employees, then the affected employees must be provided with:

> (i) access to information, relevant to the continuation of the employee's employment, about the decision; and
>
> (ii) an opportunity to comment on the information to their employer before the decision is made.

[39] Unfortunately, Ms Bode-Patterson was simply presented with a *fait accompli*. That is, a decision had been made that the business now required only one full-time employee instead of two part-time employees; and she was invited to present an application for the full-time position.

[40] Whilst Ms Bode-Patterson was, more probably than not, aware that the business was not trading to the expectations of its owners, I do not accept that she would have had any inkling that the Smiths were contemplating that she, or Ms Gibson-Patmore, would lose their employment within a week of being informed that only one employee was required. And while it is accepted that I Love Merino is quite a small business, that does not excuse the absolute failure by the Smiths to observe the rather basic requirements of s.4 1A (c) of the Act to provide relevant information about what was being proposed and allowing an opportunity to comment before the decision was made.

[41] While the failure to adequately consult with Ms Bode-Patterson could be seen to have been mitigated to some extent by the fact that she took the opportunity to discuss with Ms Hammond-Smith the possibility of the two employees working 20 hours each per week rather than the existing 30 hours, this proposal appears to have been dismissed immediately as being still too costly for the business. Ms Bode-Patterson never requested further information as to the costs involved, but one would have expected the Smiths to have at least given some consideration to the idea before rejecting it out of hand.

[42] I find that the failure to observe the provisions of s.4 1A (c) of the Act is not what a fair and reasonable employer could do in the circumstances.

[43] A further circumstance relating to the dismissal of Ms Bode-Patterson is that notwithstanding the failure to adequately consult with her about the possible loss of her employment, she was required to prepare an application for the full-time position and present it within four working days. Ms Bode-Patterson was on sick leave on Friday, 11 November 2011, the day the application was due and she presented a medical certificate, albeit it provided no information as to why she was unwell. But that is not really the issue.

[44] What is relevant is that via a letter delivered to Mr Smith on her behalf, Ms Bode-Patterson requested a further two weeks to make her application. While it is difficult to understand (or accept) why a further two weeks time was required, particularly given that Ms Bode-Patterson had not ever said beforehand that the timeframe was unreasonable, it is significant that the Smiths were not prepared to give any consideration at all to Ms Bode-Patterson’s request, let alone allow her a lesser period of time than she had requested. And while it is accepted that the extension of

two weeks requested by Ms Bode-Patterson was not reasonable, it was most unreasonable for the Smiths to simply appoint Ms Gibson-Patmore to the full-time position without discussing with Ms Bode-Patterson the request she had made for an extension of time and/or the implications for her.

[45] The actions of the Smiths in regard to Ms Bode-Patterson's application for the full-time position was not what a fair and reasonable employer could do in the circumstances. Indeed, such behaviour gives some credence to the argument advanced for Ms Bode-Patterson that regardless of whether she had presented an application, she was not going to be considered for the position in any event.

[46] The unfair and unreasonable actions by the Smiths culminated in the immediate dismissal of Ms Bode-Patterson when she arrived at work on Monday, 14 November 2011.

The dismissal of Ms Bode-Patterson

[47] I find that the dismissal of Ms Bode-Patterson was unjustifiable and not what a fair and reasonable employer could do in all the circumstances. This is because:

(a) The Smiths failed to consult with Ms Bode-Patterson about the reasons for the disestablishment of her part-time position and also the outcome for her if she was unsuccessful with her application for the full-time role, and/or when her continued employment could be affected.

(b) The requirement to consult, where it is reasonably practicable to do so, has been established by the Court of Appeal[9] and more recently confirmed by the Employment Court[10].

(c) The failure to consult with Ms Bode-Patterson was also a breach of s.4 1A (c) of the Act. This is because there was a failure to provide her with access to information relevant to the continuation of her employment. The type of information that would have been relevant would have been, at the least, a basic summary of the financial position of the business and in particular, the costs associated with the

[9] For example, *Coutts Cars Ltd v. Baguley* [2001] ERNZ 660
[10] *Simpsons Farm Ltd v. Aberhart* (supra) and *Rittson-Thomas trading as Totara Hills Farm v. Davidson* (supra)

employment of two part-time people as compared with having only one full-time person employed.

(d) There was no opportunity given for Ms Bode-Patterson to comment on the effect of the disestablishment of the two part-time positions before a decision had been made to replace them with a full-time role. Clearly, the end result was always going to be that there was a 50/50 chance that Ms Bode-Patterson would lose her employment.

(e) The failure of the Smiths in regard to the above aspects of Ms Bode-Patterson's dismissal was compounded by the refusal to allow her any extension of time to apply for the full-time role, though given the overall evidence, it is probably unlikely that she was ever going to be given any meaningful consideration for that role.

Remedies

[48] Because Ms Bode-Patterson was unjustifiably dismissed, she has a personal grievance for which remedies may be provided by the Authority under s.123(1) of the Act.

(a) ***Reimbursement of lost wages***

[49] Ms Bode-Patterson asks to be reimbursed for the loss of four months' wages.

[50] In a redundancy setting, the first factor that must be considered is whether or not the redundancy was genuine and hence: Was the loss of employment inevitable? The arguments for Ms Bode-Patterson have suggested that the disestablishment of the two part-time positions was a charade, or a strategy, deliberately adopted by the Smiths to remove Ms Bode-Patterson from her employment, because it was perceived by her employer that her personal life was of such a nature that she was becoming difficult.

[51] But there is no substantive evidence to support the argument that Ms Bode-Patterson's employers had issues with her. And notwithstanding the indecent haste in which decisions were implemented, there is no tangible evidence to suggest that there were other than valid reasons for reducing the wages component for the business. But unfortunately, the failure to consult with Ms Bode-Patterson and the failure to observe

the relevant provisions of the Act, leaves some doubt in regard to whether there may have been other alternatives apart from disestablishing the two part-time positions. For instance, Ms Bode-Patterson proposed that the two employees could reduce their working hours from 30 to 20 per week – a total of 40 paid hours rather than the current 60 hours. This proposal appears to have been dismissed out of hand without any consideration at all.

[52] While it has to be accepted that the owners of the business are best placed to decide on its financial options, it is difficult to understand why Ms Bode-Patterson's suggestion did not at least warrant some consideration and the provision of a more meaningful response.

[53] The evidence also points towards the business moving into the busier summer season along with the arrival of cruise liners at the nearby port, thereby providing substantial numbers of tourists with the potential to contribute to the local economy. And the Christmas trading period was not far away and it appears to be significant that another employee was engaged from the first week in January 2012 and this person was paid 10-12 hours each week and up to 30 hours (or more) per week by mid-May 2012. While Mr Smith has (logically) explained that he and his wife needed to have some time away from the business, there appears to be no good reason why Ms Bode-Patterson could not have been retained to allow the Smiths to have time off. It seems to me that there was a real possibility that Ms Bode-Patterson's employment could have been continued for at least some time longer and a fair and reasonable employer would have given consideration to possible alternatives before making an irreversible decision, without consultation, to eliminate her employment.

[54] Then there is the issue whereby Ms Bode-Patterson was not given an extension of time to apply for the full-time role. It has been suggested by the respondents that Ms Bode-Patterson was not interested in the full-time position, as evidenced by her returning stock to the racks that she had set aside for herself; upon being informed of the decision to establish the part-time positions. But it seems more likely that Ms Bode-Patterson realised that her position and income were no longer secure and hence she was not going to commit to any new expenditure on clothing.

[55] On the other hand, it has to be accepted that Ms Bode-Patterson was not particularly committed to applying for the full-time position as evidenced by her request for an extension of time of two weeks. Her explanations about this were not

convincing and I am inclined to the view that she did not want to work full-time, notwithstanding that I have concluded that she should have been given the benefit of the doubt by allowing her a few extra days to at least have the opportunity to produce an application for consideration for the full-time role. Though I have to say that I consider it possible that even if an extension of time had been allowed, Ms Bode-Patterson may not have taken advantage of it.

[56] The submissions for the respondents point to the requirement of Ms Bode-Patterson to show that she had attempted to mitigate her loss of income. It is said that she has not satisfied this requirement. But as evidenced by the notes taken by Ms Bode-Patterson's psychologist (dated 18 November 2011), Ms Bode-Patterson had applied for and had obtained an interview for a job at a local New World supermarket. And then, as at 25 January 2012, the notes record that Ms Bode-Patterson was at the "top of the list" for the New World job. The notes of the psychologist are at odds with Ms Bode-Patterson's evidence that she was unable to work "for a long time" because of the way the dismissal effected her.

[57] I conclude that on balance, Ms Bode-Patterson did attempt to mitigate her loss of income and hence it is now a matter of assessing her entitlement to reimbursement of wages.

[58] Section 128 of the Act provides that having determined that an employee has a personal grievance and that the employee has lost remuneration, then the Authority must order the employer to pay to the employee the lesser of a sum equal to the lost remuneration or three months' ordinary remuneration. And at subsection (3), the Authority has discretion to award more than three months' remuneration.

[59] I conclude that because of the failure of the employer to adequately consult with Ms Bode-Patterson and provide her with relevant information about the wages costs associated with the business, the fact that another employee was engaged at the beginning of 2012, and Ms Gibson-Patmore's hours of work increased from February 2012, then there must be an assumption in favour of Ms Bode-Patterson that she should be reimbursed for the full loss of wages.

(b) ***Compensation***

[60] Ms Bode-Patterson seeks an award in the sum of $10,000. Her evidence refers to the shock and upset that she felt when she was informed on 14 November 2011 that

she was no longer employed. Ms Bode-Patterson also attests to the emotional impact of her dismissal and the sense of betrayal she felt by being suddenly dismissed, particularly given that she felt close to Mrs Hammond-Smith who she trusted like "a sister".

[61] Ms Bode-Patterson says that the hurt and humiliation she suffered was aggravated by the subsequent conduct of Mrs Hammond-Smith "in mounting a campaign of lies and slander" aimed at destroying her reputation and preventing her from obtaining another job. Ms Bode-Patterson refers to "… a work mate from the *Bay of Plenty Times*" reporting to her that this person had been told by Mrs Hammond-Smith that Ms Bode-Patterson lost her job because she had "too many problems". Ms Bode-Patterson says that the "workmate" was only one of many people that Mrs Hammond-Smith had spoken to in negative terms about her. But all of this is just inadmissible hearsay and such evidence cannot be given any weight by the Authority.

[62] And then there is the evidence in a similar vein from Mr Gibson-Patmore. But I found his evidence, generally, to be unreliable to such an extent that little weight can be given to much that he has attested to. This is particularly so given that as at the date of the investigation meeting, his wife (Judy Gibson-Patmore) was also pursuing a personal grievance against the respondents. And notwithstanding an obvious conflict of interest, because Ms Gibson-Patmore was a candidate for and was then appointed to, the full-time job, Mr Gibson-Patmore was involved in advising the Smiths in regard to the redundancy process and the subsequent grievance raised by Ms Bode-Patterson.

[63] Ms Bode-Patterson attempts to portray that her mental health issues have been largely caused by the circumstances pertaining to the loss of her employment, and she also alleges that the Smiths were aware of the purported fragility of her mental health and the effect that the loss of her employment would have. It is argued that because the Smiths had knowledge of Ms Bode-Patterson's mental health history they should have taken more care in regard to their actions and the consequences for Ms Bode-Patterson.

[64] The overall evidence now before the Authority reveals that Ms Bode-Patterson has had a very troubled personal life due to various domestic issues that have arisen over many years. But this evidence was not available to the Smiths prior to the

dismissal of Ms Bode-Patterson and while it is possible that the Smiths may have been aware that Ms Bode-Patterson had some personal problems, I doubt that they would have had specific knowledge of the general complexity of Ms Bode-Patterson's personal life at the time the decision was made to terminate her employment. Indeed, the clinical notes provided by Ms Bode-Patterson's psychologist record that Ms Bode-Patterson was "quite happy" in her job and presumably that is the perception that the Smiths would have had. The notes of the psychologist (18 November and 9 December 2011) also record that Ms Bode-Patterson had applied for the New World job and was engaging in various social activities. All of this is rather at odds with her evidence that she remained at home as long as she could to "try and heal".

[65] Nonetheless, I accept that the termination of Ms Bode-Patterson's employment came as a shock to her and affected her to a degree that warrants an award of compensation. I also take into account that Ms Bode-Patterson had only been employed for a bit more than seven months and I accept the evidence for the respondents that Ms Bode-Patterson was, most probably, aware that trading conditions for the business were uncertain and she had expressed some concerns about the security of her position; as also revealed in a statement provided by Ms Gibson-Patmore. Also the relatively small scale of the business must be a factor for consideration.

[66] On balance, I conclude an award of compensation in the sum of $6,000 is appropriate.

Determination and remedies

[67] For the reasons set out above, I find that:

(a) The dismissal of Ms Bode-Patterson was not what a fair and reasonable employer could do in all the circumstances that existed at the time and hence her dismissal was unjustified.

(b) Pursuant to s.123(1)(b) of the Act the respondent[11] is ordered to pay to Ms Bode-Patterson four months' reimbursement of wages at the average sum paid to her during her employment.

[11] The evidence of Mr Smith is that I Love Merino Limited was the employer of Ms Bode-Patterson.

(c) Pursuant to s.123(1)(c)(i) of the Act, the respondent is ordered to pay to Ms Bode-Patterson compensation in the sum of $6,000.00

(d) Applying s.124 of the Act, the Authority finds that Ms Bode-Patterson did not contribute to the circumstances that gave rise to the personal grievance.

Costs

[68] Costs are reserved. The parties are invited to resolve this matter if they can, taking into account the daily tariff approach of the Authority. In the event that a resolution regarding costs cannot be reached, the applicant has 28 days from the date of this determination to file and serve submissions with the respondent having a further 14 days to respond.

K J Anderson
Member of the Employment Relations Authority