

BETWEEN

SACHA PETERSON
Applicant

AND

JOHN ANDREW REGINALD
COX T/A BLOMKAMP COX
SOLICITORS
Respondent

Member of Authority: Eleanor Robinson

Representatives: Eska Hartdegan, Counsel for Applicant
John Cox, Representative for Respondent

Investigation Meeting: 12 November 2015 Auckland

Submissions received: 9 May 2014 from Applicant and from Respondent

Determination: 19 November 2015

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Sacha Peterson, was employed as a Legal Secretary by the Respondent, John Andrew Reginald Cox t/a Blomkamp Cox Solicitors (Blomkamp Cox) until her employment was terminated by reason of redundancy on 9 December 2011.

[2] Ms Peterson claims that she was unjustifiably dismissed on the basis that the redundancy was not genuine. Ms Peterson further claims that she was unjustifiably dismissed by reason of her pregnancy, and that Blomkamp Cox breached the duty of good faith it owed to her.

[3] Blomkamp Cox denies that Ms Peterson was unjustifiably dismissed and claims that her employment was justifiably terminated on the basis that her position had become surplus to requirements and also that she had requested voluntary redundancy.

[4] Blomkamp Cox also denies that it discriminated against Ms Peterson on the grounds of pregnancy or that it breached the duty of good faith towards her.

Issues

[5] The issues for determination are whether or not:

- Ms Peterson was unjustifiably dismissed by Blomkamp Cox.
- Blomkamp Cox discriminated against Ms Peterson on the grounds of her pregnancy
- Blomkamp Cox breached the duty of good faith it owed to Ms Peterson

Background Facts

[6] Blomkamp Cox is a small legal firm specialising in business and property law, residential and business conveyancing, estate and financial planning and trusts, insolvencies' civil litigation and family law.

[7] During the period when Ms Peterson was employed, Blomkamp Cox had four members of staff, Mr Cox, Ms Peterson, Mr Ian Gibson, Staff Solicitor, and Ms Jade Walker, Legal Executive. Mr Gibson had joined Blomkamp Cox in March 2011 replacing another employee who had specialised in immigration law. Mr Cox was the primary generator of fees in Blomkamp Cox.

[8] Ms Peterson was employed as a Legal Secretary and provided with an individual employment agreement (the Employment Agreement). The Employment Agreement named the employer as "*John Andrew Reginald Cox trading as Blomkamp Cox Solicitors*", and was signed by Ms Peterson and Mr Cox. It specified her date of commencement as 13 September 2010, hours of work as 40 per week, and an annual salary of \$45,000.00. The notice period was specified at clause 14 as four weeks to be given by either party. Ms Peterson's duties were specified in the attached Schedule as:

The duties of the employee shall be to act as legal secretary, and undertake such administrative and support tasks as shall be from time-to-time required.

[9] In her position as Legal Secretary, Ms Peterson primarily provided secretarial services to Mr Cox, with a small proportion of her time spent assisting Mr Gibson and Ms Walker who mainly managed their own files. She also carried out administration tasks including reception, handling the mail and answering telephone calls. Ms Peterson, who was

studying to be a legal executive, said she was also provided with some training in conveyancing by Ms Walker.

[10] Mr Cox stated that during 2011 Blomkamp Cox suffered financial difficulties as a result of the global world crisis, and this was compounded by the loss of two major clients. Ms Peterson said she had been unaware of any financial difficulties being faced by Blomkamp Cox during 2011, and Mr Gibson said that he was aware of a general decrease in conveyancing work, but had not been aware of any serious financial difficulties faced by Blomkamp Cox at that time.

[11] On 2 November 2011 Mr Cox was admitted to hospital with a serious illness and there was no indication at that time of when, or if, he would be able to return to work. He was the primarily responsible for the generation of work for, and the operation of, Blomkamp Cox as a business. As a result this had a serious adverse impact on its financial sustainability.

[12] Mr Gibson said that he had been made aware that as a result of Mr Cox's absence there were serious difficulties with the Blomkamp Cox operational bank account, especially as there was no certainty as to if, or when, Mr Cox would be able to return to work. He had consequently been involved in immediate discussions with the bank to ensure Blomkamp Cox could continue to operate.

[13] The situation and the security of their continued employment had been the focus of conversation between the three employees during early November 2011. Mr Gibson said he had asked if they would all consider continuing in their employment without pay until it became clear whether or not Mr Cox would be able to return to work.

[14] He and Ms Walker agreed to do so; however Ms Peterson said she could not afford to, given her pregnancy and the fact that she was trying to save monies in order that she could take a year's break from employment following the birth of her baby.

[15] Mr Gibson said Ms Peterson requested that her position be made redundant as she had redundancy insurance which covered her salary payments and she required a full income until her baby was born. He said that Ms Peterson had made it clear to him that she understood that due to Mr Cox's hospitalisation she had little or no work, and that her position was redundant on that basis.

[16] After various discussions with Ms Peterson during the week commencing 7 November 2011 Mr Gibson said that she had agreed to accept that her position was redundant. Mr Gibson also said that she had explained to him that the redundancy could not be voluntary or it would invalidate the redundancy insurance policy, and had requested that the compulsory

redundancy be recorded in writing in order that she could make a redundancy insurance claim. Mr Gibson said that Ms Peterson had also asked if the 20.5 days leave she owed to Blomkamp Cox could be waived, as it would assist her with her redundancy insurance application.

[17] Mr Gibson had written and signed a letter confirming Ms Peterson's redundancy addressed to her, however she requested that the letter be signed by Mr Cox as her employer.

[18] Mr Cox said that Mr Gibson had visited him in hospital during the early part of November 2011. Although Mr Gibson had only referred in general terms to the deteriorating nature of the business, he had however been aware of a drastic and immediate need to reduce the number of employees.

[19] On the evening of 14 November 2014 Mr Cox had been visited by Mr Gibson who presented him with a letter addressed to Ms Peterson which Mr Cox subsequently signed. The letter stated:

Re: Secretary Position – Redundancy

As you aware I am not well and have not worked since Wednesday 2 November and may only take on part time work leading up to Christmas.

Accordingly your position as my secretary is no longer required and unfortunately your position is redundant. The finishing date is in four weeks being Friday 9 December.

Should you wish to finish up earlier I will continue to pay you for this period in order to assist you with your transition.

As you are aware I have paid you approximately 20 days leave you were not entitled to and am willing to forego repayment on the basis that the above terms are acceptable.

Furthermore I wish to thank you for your work over the past year and confirm that I will provide you with a reference if required.

[20] Ms Peterson said that following Mr Cox's absence, although her work allocation from Mr Cox had reduced, she had been occupied carrying out her administrative duties in addition to starting to clear a backlog of files.

[21] Ms Peterson denied that she had requested to be made redundant, and explained that the redundancy policy claim benefit related to a bank loan arrangement, with the redundancy benefit amount being a payment of \$50.00 per week to cover the loan repayments. This amount would not have substituted adequately for the loss of her weekly salary payment of \$865.38 gross per week.

[22] She said that the letter which Mr Gibson gave her on 14 November 2011 advising her that her position was to be terminated on the basis of redundancy had come as a complete surprise to her. The letter had been signed by Mr Gibson, but as he was not her employer, she requested that the letter be signed by Mr Cox. The letter had subsequently been signed by Mr Cox and given to her by Mr Gibson.

[23] Ms Peterson said she had not been sure that the 20 days leave referred to in the letter was the correct amount; however she had accepted it might be and had not queried it.

[24] Mr Gibson said Ms Peterson had left the office early and without authorisation on 15 and 16 November 2011. Ms Peterson agreed that she had left early on one day, but did not recall leaving early on the other day.

[25] On 16 November 2011 Mr Cox was due to come into the office for a few hours. Mr Gibson said during the Investigation Meeting that Ms Peterson had made "*horrible*" comments about Mr Cox in conversation. He had explained that it was preferable to avoid any confrontation or conflict due to Mr Cox's condition and he did not want her confronting him about the redundancy of her position. He had therefore told her to leave the office early.

[26] Ms Peterson said Mr Gibson had told her that Mr Cox felt: "*intimidated and threatened*" by her and he did not want her talking to him about her redundancy, therefore she was asked to leave the office early. She explained that she had simply wanted to discuss the redundancy of her position with Mr Cox on his visit to the office; however although she had been perplexed by Mr Gibson's statement, she had ascribed it to Mr Cox's state of health and mind at that time.

[27] Mr Gibson also told her that it was to be her last day and she was not required to work out the remainder of her notice period. This had upset her and she felt humiliated by being asked to leave early when there was work to be done by her.

[28] Mr Gibson explained that as Ms Peterson had left early without authorisation on 15 November and again on 16 November 2011, this had been disruptive and that was the basis for advising her that her secretarial services were no longer required after 16 November 2011.

[29] Mr Cox said he had been discharged from hospital after 3 weeks and had returned to the office on a part-time basis, increasing his hours gradually during the following months.

[30] Ms Angela Peterson, Ms Peterson's mother, said that she had been asked by Ms Peterson to see Mr Cox and ask him to sign the redundancy insurance claim form which had been partially completed by Ms Peterson. She had accordingly met with Mr Cox on a first occasion to do so and to arrange to later collect a reference for Ms Peterson.

[31] Ms Angela Peterson subsequently met again with Mr Cox in early December 2011 and queried why Ms Peterson's position had been declared redundant when there appeared to be another employee performing her duties at Blomkamp Cox. She explained that Mr Cox had told her that if Blomkamp Cox was still operating there was no certainty it would be trading post-Christmas 2011, but that if it was, he might be able to offer Ms Peterson a part-time position.

[32] Mr Cox said he could not recall the conversation with Ms Angela Peterson in any detail. However his view was that Ms Peterson's role as Legal Secretary was redundant due to his reduced work load. He had also understood that she required full-time employment due to her pregnancy and her plan to save up and take time off work to be with her baby after the birth, and there was no likelihood of full-time work in the foreseeable future.

[33] Mr Cox and Mr Gibson explained that a part-time position had been offered to Ms Kelly Sampson in December 2011 to provide secretarial services primarily to Mr Gibson. The role was on a part-time casual basis with hours worked only when and as required. Her duties included administration and conveyancing work, and some dictation and other work generated by Mr Cox. Mr Cox said the role filled by Ms Sampson was not the Legal Secretary role Ms Peterson had filled.

[34] Ms Sampson commenced employment in early December 2011 and worked the four week period in December 2011, the pay records provided set out her weekly pay during the first two weeks ending Thursday 8 December 2011 as being an average net amount of \$451.48.

[35] Mr Cox said he returned to working on a full-time basis, albeit at lesser hours than prior to his illness, during 2012 and was currently responsible for generating two thirds of Blomkamp Cox's income.

[36] Ms Sampson's employment continued on a regular weekly basis throughout 2012, and she is now a full-time permanent employee.

Determination

Was Ms Peterson unjustifiably dismissed?

[37] Justification for dismissal is stated in the Employment Relations Act 2000 (the Act), which at s 103A sets out the Test of Justification as being:

S103A Test of Justification

- i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- ii. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[38] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. An employer must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[39] As regards a redundancy situation, in *Michael Rittson-Thomas T/A Totara Hills Farm v Hamish Davidson*¹ (Rittson) the Chief Judge considered that the Court cannot impose or substitute its business judgment for that of the employer taken at the time, however:

[54] ... 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.

¹ Unrep [2013] NZEmpC 39 20 March 2013

[40] At the heart of this case is a dichotomy between the evidence of Ms Peterson and Mr Gibson. Mr Gibson's evidence is that following discussions in the office between the three employees following the hospitalisation of Mr Cox and the undoubted financial upheaval that created, Ms Peterson requested voluntary redundancy. Ms Peterson's evidence is that she did not seek redundancy and was advised that her position was redundant by Mr Gibson presenting her with the letter dated 14 November 2011.

[41] Mr Gibson's contention that the redundancy of Ms Peterson's employment took place at her request relies upon Ms Peterson wishing to access redundancy insurance which offered her full coverage for her weekly salary payment of \$865.38.

[42] However that contention presupposes that Ms Peterson was under a misapprehension as to the benefit payable under the redundancy insurance policy, which I do not accept in light of her clear evidence that the redundancy insurance had been taken out as part of the bank's requirements for a loan, and the documents confirming the amount of benefit payable by the insurance company submitted by Ms Peterson confirm that weekly amount payable was \$50.00 per week.

[43] Further whilst the situation during the early part of November 2011 was uncertain and the employees were concerned about their security of their employment, Ms Peterson had ongoing work, and there was a possibility that Mr Cox might return and be able to assume his work with the associated requirement for a Legal Secretary.

[44] I find that the genuineness of the decision to make Ms Peterson's position redundant is to be doubted on the basis that Ms Sampson was engaged in early December 2011 to carry out general administration duties which formed part of Ms Peterson's role, in addition to some conveyancing work for Ms Walker, which was an area of work in which Ms Peterson had received some training, and she also performed some dictation and other work generated by Mr Cox, although I accept that initially this part of the work duties would have been small.

[45] These duties had been part of Ms Peterson's role prior to 16 November 2011, and I note that Ms Sampson's first two weekly salary payments were made by 8 December 2011, prior to the expiry of Ms Peterson's notice period on 9 December 2011. Whilst Ms Sampson worked on a part-time basis during these two weeks, Blomkamp Cox was also paying Ms Peterson, and there was consequently no salary saving which does not accord with the business being in grave financial difficulties.

[46] Ms Peterson confirmed that she would have accepted part-time work had it been offered, and Mr Gibson confirmed at the Investigation Meeting that he was not sure he had

asked Ms Peterson if she would accept part-time work prior to the termination of her employment.

[47] Moreover in early December 2011 Ms Angela Peterson questioned the engagement of another employee to carry out duties that Ms Peterson could have been performing, and indeed which she had been performing until she had been sent away by Mr Gibson on 16 November 2011. She had told Mr Cox that Ms Peterson would have accepted ongoing part-time employment especially as she was unlikely to obtain any alternative employment prior to the Christmas period and in light of her pregnancy.

[48] I find that a fair and reasonable employer could have discussed the possibility of part-time employment with Ms Peterson prior to making the decision that her position was redundant, particularly in circumstances in which it was by no means definite that Mr Cox would not be returning to work, noting that he did in fact return to Blomkamp Cox within a matter of weeks, albeit on an initially reduced hours basis.

[49] Further, whilst Ms Peterson's duties during Mr Cox's absence in November 2011 were non-fee generating, it was nonetheless work encompassed within her duties as set out in the Schedule to the Employment Agreement.

[50] I do not find that there was substantive justification for the redundancy of Ms Peterson's position.

Fair Procedure

[51] Section 4 of the Act addresses the requirement for parties to the employment relationship to deal with each other in good faith. Section 4(1A)(c) is relevant to a redundancy situation and requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee, to provide to the employee affected:

“(i) access to information, relevant to the continuation of the employees' employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before a decision is made.” s4 (1A)(i) and (ii).

[52] I find that Blomkamp Cox failed to adhere to the requirements of procedural fairness.

[53] I determine that Ms Peterson was unjustifiably dismissed by Blomkamp Cox.

Did Blomkamp Cox discriminate against Ms Peterson on the grounds of her pregnancy?

[54] I find no evidence that Ms Peterson's dismissal was motivated by the fact of her pregnancy. I find it more credible from the evidence that Mr Gibson had or developed an antipathy towards Ms Peterson during the very stressful situation in which all three employees were placed resulting from the uncertainty created by the absence of Mr Cox and uncertainty as to the future of Blomkamp Cox.

[55] I find support for this conclusion from the evidence provided by Mr Gibson during the Investigation Meeting that he did not offer Ms Peterson the part-time work as he did not like the way she behaved and the comments she made about Mr Cox.

[56] I also find that the situation was aggravated by the unauthorised absences of Ms Peterson which created some further stress for Mr Gibson. It may also be a factor that Ms Sampson, whom Mr Gibson knew, was available and willing to accept employment on a part-time, casual basis at that time.

[57] I determine that Blomkamp Cox did not discriminate against Ms Peterson on the grounds of her pregnancy.

Did Blomkamp Cox breach the duty of good faith it owed Ms Peterson?

[58] I have already found that Blomkamp Cox breached the duty of good faith it owed to Ms Peterson during the redundancy and subsequent termination of her employment.

Remedies

[59] Ms Peterson has been unjustifiably dismissed and she is entitled to remedies.

Lost Wages

[60] Employees are under a duty to mitigate their loss². Ms Peterson's evidence was that she made no attempt to find alternative employment until some 7 months after the birth of her baby on 18 March 2012.

[61] In these circumstances I find that there is no compensation for lost wages payable to her.

² *Allen v Transpacific Industries Group Ltd (t/a "Mediasmart Ltd (2009) 6 NZELR 530, at [78]*

Parental Leave entitlement

[62] Entitlement to paid parental leave is determined in accordance with the provisions of the Parental Leave and Employment Protection Act 1987 (PLEPA). The purpose of the PLEPA is as stated in s 1A to: “*entitle certain employees and self-employed persons to up to 14 weeks of paid parental leave*”.

[63] Female employees are entitled to paid parental leave in accordance with s 7 of the PLEPA which states:

7 Entitlement of female employee to maternity leave

Except as otherwise provided in this Act, every female employee—

(a) who becomes pregnant; and

(b) who, at the expected date of delivery, will have been in the employment of the same employer for at least an average of 10 hours a week over—

(i) the immediately preceding 12 months; or

(ii) the immediately preceding 6 months,—

shall be entitled to maternity leave in accordance with this Act.

[64] If Ms Peterson had not been unjustifiably dismissed she would in all probability have continued in employment until March 2012 and been entitled to paid parental leave.

[65] The amount payable as parental leave in April 2011 when Ms Peterson’s baby was born is set out in s 71M of PLEPA as being:

71M Amount of parental leave payment

The rate of parental leave payment payable to any employee is the lesser of—

(a) \$458.82 per week (or any adjusted amount set under [section 71N](#) or any other amount set under [section 71O](#)); and

(b) the greater of—

(i) 100% of the employee’s ordinary weekly pay before the commencement of the parental leave; and

(ii) 100% of the employee’s average weekly earnings.

[66] I order that John Andrew Reginald Cox t/a Blomkamp Cox Solicitors pay to Ms Peterson the sum of \$6,423.48 as parental leave payment pursuant to s 71M of PLEPA (calculated as \$458.82 per week x 14 weeks)

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[67] Ms Peterson is entitled to compensation for humiliation and distress. I find that in respect of the unjustifiable dismissal, and its unexpected nature, Ms Peterson suffered distress. She also had to return to work sooner than expected due to the inability to save as she had intended in order to have a period of extended time at home with her baby.

[68] I order John Andrew Reginald Cox t/a Blomkamp Cox Solicitors to pay Ms Peterson the sum of \$10,000.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i) of the Act.

Contribution

[69] I have considered the matter of contribution as I am required to do under s124 of the Act. There is no evidence that Ms Peterson contributed to the situation which gave rise to the grievance. There is to be no reduction in remedies.

Penalty for breach of good faith

[70] In regard to a claim for breach of good faith, this is connected to the unjustifiable dismissal which I have addressed and in respect of which remedies have been applied. On this basis I award no penalty.

Costs

[71] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority