

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2021] NZERA 361
3126854

BETWEEN

KIRSTY ELLIS
Applicant

AND

APX TRAVEL MANAGEMENT
(a division of HELLO WORLD
TRAVEL SERVICES (NZ)
LIMITED)
Respondent

Member of Authority: Eleanor Robinson

Representatives: Dave Cain, advocate for the Applicant
Alastair Espie, counsel for the Respondent

Investigation Meeting: 10 August 2021 at Auckland

Submissions [and further 10 August 2021 from the Applicant and from the Respondent
Information] Received:

Date of Determination: 13 August 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Kirsty Ellis, claims that she was unjustifiably dismissed as a result of a restructuring exercise by the Respondent, APX Travel Management (APX), (a division of Hello World Travel Services (NZ) Limited (APX) (HLO).

[2] APX denies that Ms Ellis was unjustifiably dismissed and said that she had voluntarily elected to accept redundancy rather than being made redundant.

[3] The issue requiring determination is whether or not Ms Ellis was unjustifiably dismissed by APX.

Background

[4] HLO of which APX is part, operates in the area of leisure travel. Ms Ellis was employed by APX in May 2018 as a Corporate Account Manager based in Auckland.

[5] In early 2020 Covid-19 impacted New Zealand and had an immediate and severe impact on the leisure travel industry in particular.

[6] On 13 March 2020 Mr Simon McKearney, the Executive General Manager of HLO New Zealand, wrote to all New Zealand employees by email informing them about the effect COVID-19 was having on the business. In the letter he outlined the fact that changes had to be made to protect the business's interests which included managing staffing in three ways which were outlined in the letter:

Over the last few weeks, I, along with some of our great management team, have had to balance customers, members, suppliers, shareholders and most importantly, your needs to ensure we are in the best shape to fight through. ...

However, with all that has been said so far, we must now move to another phase of this fight that is the singularly most difficult, that any leader should face – that being to address our staff levels to match the short, medium and long term workloads of our business. ...

I have spoken to our leadership team and advise that we now use the 3 levers available to us to right size the balance of our people. This process began a few weeks back but in brutal summary, those 3 levers are:

1. **Annual leave** - All staff should now have committed to have a balance under 80 hours by 30th June. ...
2. **3 to 4 day working weeks** – Again many of you have moved to this for which I thank you. Yes this is a reduction in your wages by circa 20% each day, but that enables us to obtain more oxygen for this fight ...
3. Redundancy – Despite the above two levers we must also actively engage the final lever of letting our people go. Again I have asked our exec team to examine and consider their area outlooks and adjust our people according the process. This process is now underway in many areas.

[7] Mr Alex Trifonidis, Group General Manager Human Resources, said in his evidence to the authority that on 23 March 2020 HLO instigated a cost reduction exercise due to a significant reduction in revenue as a result of the COVID-19 pandemic on the business. That same day the CEO of HLO wrote to its New Zealand employees advising it would bring forward its annual company close down period. This was for a number of reasons including:

- (a) Closure of international borders on 19 March 2020, meaning there was little or no work to do;
- (b) Alert level 3 announcement made by the New Zealand Government on 23 March 2020; and

(c) Alert level 4 commencing 25 March 2020.

[8] Ms Ellis said she had attended a meeting held on 23 March 2020 at which she and other employees were advised that HLO would be closing for approximately 12 weeks from 27 March. She said some skeleton staff were kept on but the majority of the employees including herself were placed on leave at the end of that week.

[9] The situation made her feel anxious and at that stage she was not aware whether or not she would be receiving the Government wage subsidy. As a result she had told two members of the APX HR team at the end of the meeting that she would be unable to financially afford to stay in her Auckland flat. She had as a result of the information provided by HLO given up her flat in Auckland and relocated back to her home in Gisborne shortly after the 23 March 2020 meeting.

[10] On 24 March Mr Trifonidis said that Mr McKearney sent an email to the CEO and executive management team advising that HLO would be able to apply for the wage subsidy.

[11] On 27 March 2020 this information was conveyed by Mr McKearney update to all New Zealand staff, including Ms Ellis, in an update in which he confirmed HLO's commitment to supporting its employees during the lockdown period and confirming that the wage subsidy had been granted and would be managed through the payroll system.

[12] Also on 27 April 2020 the CEO of HLO sent an update to all employees in which was stated:

Although we have been able to find contract work for some people in Melbourne and Sydney, sadly, over a thousand personnel are currently stood down in Australia, New Zealand, Fiji, India, the Philippines and the United States and a further 250 people have exited the business. ...

But to be clear, the re-emergence of significant international travel is 9 to 12 months away from today so in the meantime it's going to require travel businesses to basically go into hibernation for the next 6 months or so once the enormous backlog of cancellations and refunds have been attended to.

[13] On 1 May 2020 AXS released an announcement to the financial market on the position of HLO which Mr Trifonidis said was sent to all employees of HLO. Ms Ellis said she did not recall having received it, however said that she was aware that the impact of Covid-19 on HLO's business had been severe because she had been following available information on it.

[14] Ms Ellis said that following the HLO announcement on 14 May 2020 that it would not be in a position to reopen on 31 May 2020, and asking that employees consent to remained closed until 31 July 2020 she decided to work in a limited capacity as a volunteer for some of her clients.

Consultation Meeting 6 July 2020

[15] On 1 July 2020 Mr McKearney wrote to the APX employees, including Ms Ellis, to advise the proposed changes being made to the workplace. The email stated:

As you are aware, the Covid-19 virus has had a substantial impact on our business. Revenue has dropped very significantly from previous years and cost containment measures are in place across our offices around the world.

We are writing to invite you to a meeting to commence a consultation process to discuss proposed changes in the business that may affect your employment with the company. The first meeting is due to be held Monday 6 July 2020 via teleconference ...

During this meeting we will outline the proposed business changes under consideration and its rationale. Following the meeting we will be seeking your feedback about any questions, comments or alternatives which will be taken into consideration before any decision is made.

Any feedback may be received in writing, by face to face or a Zoom/Skype meeting if you prefer. You are invited to have a representative or support person to attend any meetings relating to this consultation.

[16] Ms Ellis said she attended the meeting on 6 July 2020 remotely. In the proposal there were several areas across the business that were decreasing in head count, however it was very clear that her role as Account Manager for Auckland was not impacted. She received a copy of the Proposed Restructure pack which set out the rationale for the restructure and included the following information:

HLO's TTV has been dramatically impacted by COVID-19 across all business units and we expect revenues from travel sales and operations to remain at around 5% of previous levels for the remainder of 2020.

HLO responded quickly ,, reducing personnel numbers at the beginning of April ...

Based on current expectations, HLO will incur cash losses of \$1.5m -\$2.0m per month for the next six months ...

The lack of revenue generation is forcing the business to review its staffing numbers and this has resulted in the need to resize the business.

[17] Staff were given until 10 July 2020 to supply feedback on the proposed restructure before final decisions were to be advised on 17 July 2020. As her role was not impacted, Ms Ellis said she did not consider it necessary to provide any feedback on the proposed restructure.

[18] Mr Trifonidis said that initially the restructure proposal would have seen Ms Ellis' role of Corporate Account Manager retained as a full time role. However, it was subsequently determined that a reduction in hours to this and other roles was likely to be necessary.

[19] Ms Ellis said that on 20 July 2020 she received an email from APX HR department with an attached letter from the HLO CEO which advised that HLO were continuing with the consultation process with interviews commencing on 20 July and outcomes provided by 28 July 2020 at the latest.

Ms Ellis said she had not been concerned by the email or letter because she had understood that her position as Corporate Accounts Manager was not affected.

[20] Mr Trifonidis said that between 20 to 24 July 2020 APX managers consulted with their staff on the proposed changes, including revisions to the original proposal.

[21] Ms Deborah Gyde had been the General Manager Corporate at that time. She said she had instructed her senior leadership team, including Ms Jenny Miller, to speak to their individual reports about the likelihood that roles might only be returning on a 0.6 FTE basis, and to seek expressions of interest from the employees as to whether or not they would be prepared to return to work on those terms.

[22] She had also advised that it was a recommendation only at that stage, and a clear decision would not be made until later.

[23] Ms Miller was the manager to whom Ms Ellis reported. Ms Ellis said that Ms Miller telephoned her on 23 July 2020 and told her that she was expected back at work in Auckland on 1 August 2020. Ms Ellis said Ms Miller advised her that her work was to resume as an 0.6 FTE position as that was all APX could sustain in light of significantly reduced revenues, and when she queried whether she could continue working remotely from Gisborne, Ms Miller confirmed that this was not an option.

[24] Ms Ellis said that it would not have been possible financially for her to return to Auckland earning only 60 per cent of her full salary. After the telephone call she had asked Ms Miller in an email about her options if she was unable to return to work on a 0.6 FTE basis working from home in Gisborne, and Ms Miller had responded:

Yes I really don't know.

The only thing that is certain is that Closedown ends on Friday so if they haven't notified people of what follows by Monday we would have to assume that we are back on full pay (legally).

Other than that I just don't know what they are doing.

For you I'd say just carry on as you are until you are told otherwise.

[25] Ms Gyde said that Ms Miller had advised her that Ms Ellis was not interested in resuming work in an 0.6 FTE role, or in staying with APX and wished to be 'paid out'. Ms Gyde said she had understood this to mean that Ms Ellis wished to be made redundant, and accordingly advised the HR team and Mr McKearney of this.

[26] Mr Trifonidis said that as a result of this information Ms Ellis' name was added to a list of those employees to be made redundant.

31 July 2020

[27] On 31 July 2020 Ms Ellis said she had received an email sent by the CEO to all employees advising that the consultation process would be concluded that day and managers would be presenting the outcomes.

[28] On that same day she had contacted Ms Miller in relation to some work she was carrying out and raised her concern about needing to be back in Auckland the next week. She said Ms Miller had advised her to continue what she had been doing which she understood as meaning she could continue to work from her home in Gisborne.

[29] Later that same evening she received an email from Ms Gyde stating:

Thank you for your patience while we finalise the structure process.

I am incredibly disappointed to be losing you from the business but respect and appreciate your decision.

[30] Attached was a letter which set out the redundancy decision:

Thank you for your time to discuss the proposed changes affecting your position with Helloworld.

It is with regret that as an outcome of this proposal, your role is to be made redundant. Unfortunately we could not find any alternative roles for you given the current state of our business and the impact that Covid19 has had on it. As a consequence, your employment will end on 31 July 2020.

The arrangements in respect of your redundancy are:

1. You are entitled to a notice period of four weeks.
2. Your accrued holiday entitlement.
3. Your redundancy compensation will be paid according to your employment agreement.
4. Your final payment shall be made by the next pay run.
5. If you have any questions at any time in relation to this process, please do not hesitate to speak to us.

[31] Ms Gyde said that after her letter had been sent to Ms Ellis on 31 July 2020 she had received no further communication from Ms Ellis or indeed from Ms Miller to suggest that Ms Ellis was unhappy with the outcome. In particular, Ms Ellis did not contact her after receiving the email to query what she meant by: “your decision” and correct that as a misunderstanding.

[32] Ms Ellis said that at no stage prior to receiving the redundancy letter on 31 July 2020 had she been made aware that APX was even considering making her position redundant and it came as a complete shock to her.

[33] She filed a Statement of Problem with the Authority . On 27 November 2020 raising a personal grievance for unjustifiable dismissal.

Was Ms Ellis unjustifiably dismissed by APX?

[34] Ms Ellis was dismissed from her employment with APX by reason of redundancy. 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.

[35] 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.

[36] Looking firstly at the substantive justification I find that Ms Ellis was aware that HLO as part of the leisure travel industry had been severely impacted by Covid-19. Not only had APX regularly updated its employees throughout the lockdown period, but Ms Ellis had attended the meeting on 6 July 2020 at which the proposed restructure pack had been provided with relevant information on the severity of the situation. She had also kept herself updated on the impact of the Covid-19 situation on HLO.

[37] While she had been informed at the beginning of July 2020 that her position would not be impacted by the staff restructure proposal, Ms Ellis was subsequently informed that the proposal was that her position would resume on a 0.6 FTE basis and would be based in Auckland.

[38] Ms Ellis' evidence was clear that returning to a 0.6 FTE position based in Auckland was not financially acceptable to her and she had told Ms Miller this.

[39] In these circumstances I find that APX's conclusion that Ms Ellis wished to be made redundant was reasonable.

[40] I find there was substantive justification based on the compelling financial information as to the impact of the Covid-19 situation on HLO for the revised proposal.

[41] Turning to procedural fairness and whether or not the decision to dismiss Ms Ellis by reason of redundancy was one a fair and reasonable employer could have made in all the circumstances at the relevant time, I observe that in a redundancy situation a fair and reasonable employer must, if challenged, be able to establish that he or she has complied with the statutory obligations of good faith dealing pursuant to s 4 of the Act.

[42] In *Simpsons Farms Limited v Aberhart* Chief Judge Colgan noted that this compliance with good faith dealing includes consultation “*as the fair and reasonable employer will comply with the law*”¹

[43] The duty of good faith applies to both the employer and the employee in an employment relationship. The duty required APX to consult meaningfully with Ms Ellis.

[44] It is submitted on behalf of Ms Ellis that there was no meaningful consultation with her, nor was she informed that unless she was agreeable to returning to work on a 0.6 FTE basis in Auckland her employment would be terminated by way of redundancy. Moreover Ms Ellis did not ask to be made redundant.

[45] On 23 July 2020 when Ms Miller spoke to Ms Ellis, Ms Ellis had been informed about the proposed restructure proposal and was aware from that and other updated communications that the HLO business had been severely impacted by the Covid-19 situation and it was under considerable financial pressure.

[46] In these circumstances I find that it was not essential for APX to further set out the rationale for the revision to the proposed restructure proposal to a 0.6 FTE basis for the remaining roles.

[47] Although Ms Miller’s email to Ms Ellis on 23 July 2020 following their conversation did not confirm the details of their conversation, Ms Ellis’ evidence was that she informed Ms Miller that she was not interested in resuming her role on a 0.6 FTE basis working in Auckland because this was not financially viable for her.

[48] Ms Gyde’s evidence was that her understanding that Ms Ellis wanted to be made redundant was based upon the information she received from Ms Miller. I find that her understanding was reasonable in circumstances in which Ms Ellis informed Ms Miller that returning to her role on a 0.6 FTE basis in Auckland was not viable.

¹ *Simpsons Farms Limited v Aberhart* [2006] ERNZ 825 at [65].

[49] I also find it significant that Ms Ellis did not contact Ms Gyde upon receipt of the email dated 31 July 2020 in which Ms Gyde expressed her disappointment at Ms Ellis' decision.

[50] Ms Gyde's evidence was that she and Ms Ellis had a good working relationship, this is supported by her statement that she was: "incredibly disappointed to be losing you from the business". In these circumstances I would have expected Ms Ellis to have contacted Ms Gyde in a timely manner had her understanding been incorrect. However she did not do so.

[51] I find this is most likely due to the fact that Ms Ellis understood that the inevitable effect of her expressed financial inability to accept a 0.6 FTE role based in Auckland was that her employment with APX would end by way of redundancy. This was the inevitable outcome of the decision not to accept the 0.6 FTE role in Auckland.

[52] I have considered whether the failure to contact Ms Gyde was due to shock at receiving the redundancy letter. However at the time of receipt, Ms Ellis was fully aware of the financial circumstances of her employer and of the proposal to resume work in Auckland on a 0.6 FTE basis. In this situation I do not consider that shock would account for the failure to correct any misunderstanding on Ms Gyde's part.

[53] In examining the situation in accordance with s 103(A)(5)(b) of the Act which states:

The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were-

- (a) Minor; and
- (b) Did not result in the employee being treated unfairly.

I find that given Ms Ellis had been clear that she could not financially return to the role on a 0.6 FTE basis working in Auckland, the defect as regards consultation was minor and did not result in any unfairness to Ms Ellis.

[54] I determine that Ms Ellis was not unjustifiably dismissed by APX.

Costs

[55] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[56] If they are not able to do so and an Authority determination on costs is needed the Respondent may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the Applicant would

then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[57] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[58] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.²

Eleanor Robinson
Member of the Employment Relations Authority

² *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].