

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 224/08
5096379

BETWEEN CARY RALPH
Applicant
AND PACIFIC HOME LOANS
LIMITED
Respondent

Member of Authority: Dzintra King
Representatives: Mark Nutsford, Advocate for Applicant
Shane Kilian, Counsel for Respondent
Investigation Meeting: 5 May 2008 at Auckland
Determination: 30 June 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Cary Ralph, was employed by the respondent, Pacific Home Loans Limited, as a business development manager. He commenced employment on 11 August 2006. Mr Ralph's immediate manager was Mr Marcus Merrilees, the national sales manager.

[2] Mr Ralph's aunt was living in Germany. She had been suffering from cancer and in early January 2007 Mr Ralph became aware that her condition had deteriorated. He said he rang Mr Merrilees on 15 January 2007. Mr Merrilees rang him back later in the day. Mr Ralph explained the situation to him. He said Mr Merrilees was very sympathetic and told him that cancer had affected his family as well. Mr Ralph said he was sorry for the short notice, but he needed to book his flights. Mr Merrilees said that under the circumstances the company would not refuse his leave request and to book his flights and the leave could be sorted out later.



Mr Ralph booked his flights for 19 February 2007. He was scheduled to be back in Wellington on 29 March 2007.

[3] Mr Ralph rang Mr Merrilees again on 23 January 2007 to formally arrange the leave. He said they had a chat about the effects on the family of this type of illness and how widespread it was. They discussed the best way to handle the time off as being leave without pay. Mr Merrilees advised that he would email Mr Ralph the leave application form and he should just sign it and fax it back to him again which he did on 28 February. Mr Merrilees also said he would talk to HR in the Gold Coast.

[4] Mr Ralph called Mr Merrilees again on 1 February (but did not get hold of him until the morning of 2 February) to make sure that everything was okay and that he had got the form. Mr Merrilees advised that everything was approved, and that the unpaid leave had been granted as per his request from 19 February 2007 to 30 March 2007.

[5] There is a dispute between the parties as to whether or not these conversations with Mr Merrilees actually took place. Although I do not think the issue of the leave is relevant to the fundamental issue in this case, that is whether or not the dismissal for redundancy was justified, upon having had a look at the supporting evidence, specifically the Telecom records, they bear out that the telephone calls that Mr Ralph says he made were made; and also bear out the fact that he faxed the application form to Mr Merrilees on 28 February.

[6] Mr Ralph said he received a telephone call at 11.30am on Friday, 16 February from Mr Anderson, who was a director of the company. In the course of that telephone conversation, Mr Anderson told Mr Ralph that he understood it was his last day and he would be on annual leave from Monday. Mr Anderson told him that it was not a good time for leave and he was calling to inform Mr Ralph that his employment would be *terminated as a close of business today*. Mr Anderson said that this was because his position was to be disestablished as *we could no longer afford to keep him due to the volume of work coming out of the Wellington region*. Mr Anderson then advised Mr Ralph that his letter and payslip would follow and they would cancel his cellphone account as requested. He told Mr Ralph to have a great holiday.

[7] In August 2006, Mr Peter Anderson had had discussions with Mr Merrilees, the national sales manager, regarding the performance of Pacific Home Loans Group, especially Wellington, the lowest performing office. Mr Merrilees and Mr Anderson had a meeting with Mr Ralph in August/September 2006 and discussed the performance of the Wellington office. He said it was decided at that time that they would implement a performance management programme to improve the Wellington office's performance. Following that meeting, Mr Merrilees continued the performance management programme with the Wellington office and in particular with Mr Ralph. Mr Anderson said that Mr Merrilees provided him with regular updates.

[8] Mr Anderson said the performance management programmes were implemented with the urban sales offices of the group in Christchurch, Wellington and Auckland. During the course of those discussions with the various offices, it was stressed that should the group's performance not improve, the company would have to review the sustainability of maintaining the sales structure of the group.

[9] During December 2006, due to continued failure by the sales structure of the group to sustain itself, discussions were had by the Board about concerns regarding the failure to perform and the possibility of moving the sales structure of the group from urban to rural areas. It was decided to continue with the performance management programme with the aim of reviewing the structure again in the New Year.

[10] At the end of January 2007, the Board reconvened and discussed the viability of maintaining the entire sales structure of the group. Following careful consideration and review of all facts, it was decided that the group would maintain its Nelson office as that office was performing satisfactorily and seek to redeploy the city-based sales structures to more rural areas such as Dunedin, Palmerston North and Hamilton. The Board decided to further explore the possibility of creating a sales structure in the rural areas of New Zealand.

[11] During the last week of January and the first week of February 2007, the Board had decided that it needed to conduct further feasibility studies into the use of rural areas and that due to the length of time that these studies would take, immediate action needed to be taken to disestablish the Christchurch, Wellington and Auckland offices of the group. Mr Anderson said the disestablishment of those offices was

mainly due to the poor performance of those offices, and their failure to improve despite the performance management programmes. They were not able to sustain themselves.

[12] Mr Anderson said he had discussed this event with Mr Merrilees and had decided to start discussing the disestablishment process with the Auckland and Wellington offices on 16 February 2007. The Christchurch employees had already resigned.

[13] Immediately before calling the applicant, Mr Merrilees alerted Mr Anderson to an email that he had received from Ms Emily Urquhart, the respondent's operations manager, on 15 February 2007 advising that the applicant was going away on leave as from Monday, 19 April 2007. Mr Anderson said this was the first time he had become aware of the fact that Mr Ralph was contemplating taking leave.

[14] Given that the decision had already been made to disestablish the Wellington and Auckland offices with immediate effect and that he was of the opinion that Mr Ralph was merely taking a holiday, he was concerned that Mr Ralph would use all his resources on his holiday and then come back to find that he no longer had a position available. He contacted the HR department of the parent group and discussed the matter with them. They said it would be advisable for him to contact Mr Ralph as previously contemplated. Out of concern for Mr Ralph and the possible financial situation in which he might find himself should he have overindulged on an overseas holiday, he contacted Mr Ralph and advised him that due to the disestablishment of the Wellington office, his position would be terminated. He further advised that the company would be honouring its contractual obligations by paying him two weeks' notice in lieu of redundancy.

[15] Mr Anderson said that he was at no stage aware that Mr Ralph was going to visit an ill and dying relative. He said there was no documentation in the respondent's possession that indicated the receipt of or approval given for the leave, or the reason for the leave. Mr Anderson said that if he had been aware that the applicant was planning to take leave, he would still have advised him of the respondent's decision to disestablish the Wellington office prior to his going on leave, but would have had that discussion with him at the beginning of the week.

[16] Much was made of the issue of whether or not there had been a discussion with Mr Merrilees and whether or not the leave had been approved. As I indicated at the hearing, these matters are irrelevant. The issue in this case is whether or not the dismissal for redundancy was unjustified. I accept that there was substantive justification for the redundancy, but the manner in which the redundancy was carried out was unfair.

[17] Section 4(4)(e) of the Employment Relations Act 2000 specifies that the duty of good faith set out in subsection (1) applies in a situation where employees are to be made redundant. Section 4(1) (a) requires that 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 one or more of his or her employees is to provide the employees affected with access to information relevant to the continuation of the employee's employment about the decision and provide an opportunity to comment on the information to their employer before the decision is made.

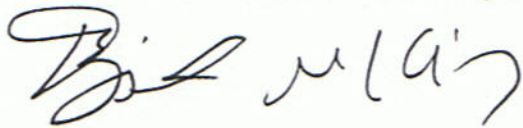
[18] It is patently clear that in this case none of these obligations were satisfied by the respondent. The fact that there was some discussion with the applicant about the fact that the business was not doing well and that certain proposals were going to be put in place is not the same thing as saying to an employee *we are contemplating disestablishing your position for the following reasons and we are now going to give you an opportunity to comment on that*. Whether or not Mr Anderson knew about the leave beforehand does not matter because, as he indicated, if he had known about the leave he would simply have communicated that decision earlier. The Board had made the decision at the beginning of February, it was a fait accompli, there could not have been any consultation with Mr Ralph regarding his redundancy.

[19] I am satisfied that any discussion regarding redeployment would not have been fruitful. Mr Ralph's remedies are limited to the manner in which the dismissal was carried out.

[20] The respondent is to pay the applicant the sum of \$6,000 pursuant to s.123 (1) (c) (i). This being a redundancy situation, I am satisfied that there was no contribution by Mr Ralph for the personal grievance.

Costs

[21] If the parties are unable to agree the matter of costs, the applicant should file a memorandum within 28 days of the date of this determination. The respondent should then file a memorandum within 14 days of receipt of the applicant's memorandum.



Dzintra King
Member of the Employment Relations Authority

