

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 286/08
5119733

BETWEEN MIRIAM EILEEN HOYTE
 Applicant

AND HAPAG-LLOYD (NZ) LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Mark Nutsford, Advocate for Applicant
 Daniel Erickson, Counsel for Respondent

Investigation Meeting: 3 July 2008

Determination: 8 August 2008

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Ms Miriam Eileen Hoyte ("Ms Hoyte") applies to the Authority for an investigation into her dismissal for redundancy. Hapag-Lloyd (NZ) Limited ("Hapag-Lloyd") says Ms Hoyte was justifiably dismissed. It submits to the Authority's jurisdiction and its counsel says it will meet any award made by the Authority concerning CP Ships (UK) Limited.

[2] The parties were unable to resolve the problem between them by the use of mediation.

The facts

[3] Ms Hoyte had been employed by Hapag-Lloyd's predecessors since 7 July 1997 in the position of Co-ordinator Customer Service Imports. In acquiring its predecessor CP Ships (UK) Limited's ("CP Ships") operation, Hapag-Lloyd set about restructuring the operation to align it with its overseas operations. The business of CP Ships was to be integrated into that of Hapag-Lloyd's existing New Zealand business.



[4] All employees of both operations were invited to attend a presentation on a proposed restructure by a letter dated 24 January 2006. The presentation proceeded on 26 January 2006 by way of PowerPoint slideshow. It included a timeline for the various stages of the proposed restructure or integration. Employees were advised that those who did not secure employment in the restructured operation would receive contractual entitlements and outplacement assistance.

[5] The details of the restructure process were confirmed by letter to all CP Ships employees dated 31 January 2006. Employees were advised to make application for up to five positions in the new structure. The application process was conducted via an intranet web page containing job descriptions and application templates.

[6] On 2 February 2006 Hapag-Lloyd advised staff of proposed criteria to be adopted in selecting employees to fill positions in the new structure. Employees were provided with a form for commenting on the selection criteria. Following consultation, there were amendments made to the selection criteria.

[7] Ms Hoyte submitted an application for her existing role, together with a sales support role and a transport role. Ms Hoyte also applied for a position as Manager Customer Services Imports but was informed by the customer services manager she would not be interviewed for the position.

[8] Ms Hoyte was interviewed for a Co-ordinator Imports role by Ms Angelique Stevens ("Ms Stevens") on 16 March 2006.

[9] On 27 March 2006 Ms Hoyte was advised that her application for a position in the Import team had been unsuccessful and that her employment would be terminated on the grounds of redundancy.

[10] Ms Hoyte wrote to the Human Resources Manager Ms Linda Vernel ("Ms Vernel"), Ms Sharon O'Brien and Ms Stevens by email of 28 March 2006. She wrote:-

I am upset, disappointed and hurt by this decision. I therefore would like answers to why other people are being kept on when:

- 1/ I have always set out to be a loyal, conscience and courteous employee.
- 2/ I believe I have fulfilled this job well doing what is asked of me and more.
- 3/ I hold tertiary qualifications for the work I do and I believe I am a lot more experienced than those that have been offered the position.
- 4/ I have been with this company and its predecessors for 8.5 years. I have turned down jobs with other companies during this time.
- 5/ where was I marked down on the criteria and how far below the other applicants was I? I have gone thru the criteria given to us and on an honest assessment of myself I have scored very highly.
- 6/ How much relevance was there on the pre-interview form vs. the physical interview.
- 7/ It is difficult to raise questions in a 24hr period when I can not see how I was graded. I therefore request a copy of my grading or a meeting regarding the grading so I can redress these issues.
I enjoy this job, its staff and its future prospects.
In conclusion I would like you to reconsider my position and also answer the above as it undermines my own belief in myself and questions my ability, loyalty and future.

[11] Ms O'Brien responded by email of 29 March 2006. She wrote:-

Miriam, thanks for your email. I can appreciate that this is a difficult process for all those involved. We are fortunate to have a very high calibre of employees working for the company and therefore a restructure and the potential for redundancies is unfortunate. With respect to your request for further information regarding your score as applied by the selection committee, the details are as follows:-

1. Fit of applicants current role with vacant role	3 (weighted x 4)	12
2. Technical skill base and fit with role	2 (weighted x 3)	6
3. Level of industry/commercial expertise and acumen	3 (weighted x 2)	6
4. Personal drive and commitment	2 (weighted x 2)	4
5. Length of service in a comparable role	3 (weighted x 1)	3
6. Current Performance	4 (weighted x 1)	4
Total		35

Regarding the question on the relevancy of the pre-interview form. The Pre-Interview Form provided the selection panel with basic background information on the work history of the candidate. The selection of candidates was based on a comparative assessment of all the employees who applied for positions. As you can appreciate we cannot divulge information about other candidates. For further info please also refer to the attached Interview Process and Selection Criteria. This approach was developed based on consultation and feedback from employees.

Regards
Sharon

[12] Meetings held on 31 March 2006 and 3 April 2006 did not alter matters nor resolve Ms Hoyte's communicated dissatisfaction with the decision to terminate her employment.

[13] Ms Hoyte remained employed until 16 June 2006 when she took annual leave to commence new employment. She was paid redundancy compensation and a bonus payment owed to her. She was also provided with outplacement assistance.

The merits

[14] The test of justification is prescribed at Section 103A of the *Employment Relations Act 2000* ("the Act"). That section provides:-

103A. Test of justification

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 considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[15] I understand Ms Hoyte to be entirely aggrieved with way she was assessed according to the criteria adopted in relation to other employees. She was advised she scored lowest. That is not a result Ms Hoyte accepts. She questions how another employee "Craig" could have scored higher than herself when his service was only two or three months and he had not come from a shipping background. She also questions how another employee "Helen" with less than one year's service could have scored higher than her. I asked Ms Hoyte if she assumed her appointment would be automatic and without any reservation, she said she had. She pointed to her nine years service, her tertiary qualification and industry experience and knowledge. She is most aggrieved she says because she was the only person replaced and because another person who had no imports experience was successful. Ms Vernel denies these points.

[16] Ms Hoyte was never shown the selection committee's score of her before the decision was taken that her employment was terminated. When it was provided to her she could not accept the selection committee's assessment of her. But it was too late

by the time she saw it. If it contained errors, mistakes or inaccuracies, she could do nothing about it before the decision was made.

[17] The starting point is always the relevant contractual document. Ms Hoyte's individual employment agreement with CP Ships provided:-

7. Redundancy

CP Ships (UK) Limited operates in a competitive market and if business is not maintained at a sufficient level your position may become redundant. Redundancy may also arise in any other circumstance where the position filled by you is, or will become, surplus to the needs of the employer.

In the event of restructuring, as defined in the Employment Relations Amendment Act (no 2) 2004 (being the sale, transfer, or contracting out of all or part of our business but not the sale or transfer of any or all of the company's shares), that may affect your future employment, your employer will:

- 1. As soon as reasonably practicable, taking into account the commercial requirements of the business, commence negotiations with the potential new employer concerning the impact of the restructuring on your position and agree on how those negotiations will be conducted.*
- 2. Negotiate with the potential new employer regarding:*
 - i. Whether or not it is proposes to offer employment to you;*
 - ii. If so, the terms and conditions on which it proposes to offer employment to you;*
 - iii. The proposed date for commencement of employment with the potential new employer.*
- 3. Subject to clause (b) below in the event that your position is made redundant, your redundancy entitlements will be determined in accordance with the following redundancy provisions.*
 - a) You shall be entitled to four weeks' notice or alternatively CP Ships (UK) Limited may choose to pay your salary in lieu of notice. Subject to clause (b) below you shall also be entitled to compensation calculated on the basis of eight weeks' salary for your first year's service and an additional two weeks salary for each completed year of service thereafter to a maximum of 52 week. Pro rata payments shall be made for part year's of service.*
 - b) Notwithstanding the foregoing you shall not be entitled to redundancy compensation in the event that you are offered reasonable and alternative employment, on substantially the same terms and conditions, either by the employer, or by any other company or other entity to whom the business or assets or part thereof, is sold.*

[18] I find that CP Ships wholly failed to meet its obligations in respect of the redundancy provision. The purchase of CP Ships' operation by Hapag-Lloyd constituted a restructuring. CP Ships was obliged to commence negotiations with Hapag-Lloyd concerning the impact of the restructure on Ms Hoyte's position and agree how those negotiations were to be conducted. I am not satisfied that this actually occurred specifically in relation to Ms Hoyte's particular employment.

[19] I am also unable to find that CP Ships negotiated with Hapag-Lloyd regarding whether or not it proposed to offer Ms Hoyte employment and if so, the terms and conditions on which it proposed to offer employment to Ms Hoyte and the date of commencement of new employment.

[20] It is my view that Ms Hoyte was not required to make application for five positions and take her chances on whether or not she would be successful. The process set out in the "Moving to One Company" presentation, was not relevant to Ms Hoyte. It was not her obligation to secure herself a new offer of employment, it was her employer's - CP Ships.

[21] It seems to me that by the redundancy provision, it was CP Ships' obligation to negotiate with Hapag-Lloyd with a view obtaining Ms Hoyte an offer of employment. I find it did not meet this express contractual obligation. Instead, it left Ms Hoyte to elicit an offer herself. This situation I find constituted a breach of the terms of the individual employment agreement - a breach of contract.

[22] So it is my view Ms Hoyte was not required to submit herself to be assessed according to criteria at all. It was her employer's obligation to obtain a new offer of employment from Hapag-Lloyd for her. The process of assessment according to the criteria related to whether an offer of new employment would be forthcoming. That process did not relate to termination. Ms Hoyte's employment was terminated by reason of technical redundancy. There was a restructure and Ms Hoyte's old employment ended because of the advent of a new employer. That being my assessment of the situation, I consider it wholly unnecessary and inappropriate for me to scrutinise the fairness and reasonableness and the application of the criteria and also the application of section 4(1A)(c) of the *Employment Relations Act 2000* because that process did not relate to the termination of employment, but instead, the invitation for a new offer of employment.

The determination

[23] I find that CP Ships failed to meet its express contractual obligation to Ms Hoyte to negotiate with Hapag-Lloyd to secure Ms Hoyte a new offer of employment. This breach is a relevant circumstance of the dismissal. I determine that CP Ships' actions and how it act were not what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. A fair and reasonable employer would at the very least have complied with its own agreement. I find that **Miriam Hoyte was unjustifiably dismissed. She has a personal grievance and she is entitled to remedies in settlement of that grievance.**

The resolution

[24] Having made those findings and in considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the *Employment Relations Act 2000* to consider the extent to which Ms Hoyte's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly. I find that Ms Hoyte did not contribute to the situation that led to the personal grievance.

Reimbursement

[25] Ms Hoyte secured alternative employment and does not seek reimbursement.

Compensation

[26] Ms Hoyte seeks \$10,000.00 as compensation. She says she told her supervisor she was angry and hurt that nobody had acknowledged her situation and that she felt betrayed by the supervisor. She says she hated going to work during the notice period and that nobody talked to her. She felt intentionally excluded most of the time. She says her social life suffered and she was depressed and just cried all the time. When at home she says all she wanted to do was get in bed and cry herself to sleep. She tells the Authority her self-esteem was at an all time low and it was six months before she fully recovered from what she describes as trauma. She describes the period as the worst six months of her life.



[27] I am satisfied that Ms Hoyte has suffered loss in the form of hurt and humiliation, loss of dignity and injury to her feelings as result of CP Ships unlawful action arising out of the termination of her employment. Having regard to her evidence, her length of service and the nature of the personal grievance, I award her \$6,000.00 compensation. **I order CP Ships (UK) Limited to pay to Miriam Hoyte the sum of \$6,000.00 as compensation.** I note that Hapag-Lloyd has agreed to meet any award.

Costs

[28] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Nutsford is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr France is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe without leave.




Leon Robinson
Member of Employment Relations Authority