

**IN THE EMPLOYMENT COURT
AUCKLAND**

**AC 33/09
ARC 40/04**

IN THE MATTER OF a de novo challenge to a determination of the
Employment Relations Authority

BETWEEN LINDA GATES
Plaintiff

AND AIR NEW ZEALAND LIMITED
Defendant

Hearing: 10, 11, 12 and 13 November 2008
(Heard at Auckland)

Appearances: Plaintiff in person
Kevin Thompson, counsel for defendant

Judgment: 11 September 2009

JUDGMENT OF JUDGE A A COUCH

[1] This case concerns the personal grievances of Mrs Gates arising out of her employment by Air New Zealand Limited and the termination of that employment. It also involves the application of s114 of the Employment Relations Act 2000 which sets time limits for raising personal grievances and for commencing action in the Employment Relations Authority or the Court in relation to personal grievances.

[2] Mrs Gates was employed by Air New Zealand from 19 December 1977 until 26 April 2002 in the accounts payable department. In March 2002, a decision was made to disestablish Mrs Gates' position. Following unsuccessful attempts to relocate Mrs Gates, her employment was terminated on 26 April 2002 on grounds of redundancy.

[3] Mrs Gates was aggrieved by her dismissal. In May 2002, she raised three personal grievances. The first alleged that the redundancy was not genuine and that her dismissal was therefore unjustifiable. The second was that she had been treated unfairly in the process leading to the decision to terminate her employment and that this constituted an unjustifiable disadvantage. The third grievance was that Mrs Gates had been discriminated against on grounds of employment status. The second and third grievances largely overlapped and were based on the alleged failure of Air New Zealand to offer Mrs Gates certain alternative positions.

[4] Those grievances were subsequently investigated by the Authority. In its determination dated 26 April 2004 (AA 140/04), the Authority recorded Mrs Gates' concession that the redundancy was genuine and dismissed her claim based on the other two grievances.

[5] Mrs Gates challenged the Authority's determination and sought a hearing de novo of the entire matter in the Court. In the statement of claim dated 24 May 2004, by which the proceedings in the Court were commenced, Mrs Gates made the same allegations as those put before the Authority. A statement of defence was duly filed and the matter was set down for a hearing beginning on 18 July 2005. As part of the pre-trial process, Mrs Gates was required to provide briefs of evidence of the witnesses she intended to call. These were filed and served on 6 July 2005.

[6] The brief of Mrs Gates' evidence dealt with a number of issues outside the scope of the statement of claim which had been filed. In particular, it focussed on allegations that Mrs Gates had been bullied in the course of her employment during the latter part of 2001. This led to an application on behalf of Air New Zealand to adjourn the fixture and to limit Mrs Gates to the issues determined by the Authority. In an interlocutory judgment delivered on 13 July 2005 (AC 39/05), Chief Judge Colgan adjourned the matter sine die and directed Mrs Gates to file an amended statement of claim. Applying the decision of the Full Court in *Sibly v Christchurch City Council* [2002] 1 ERNZ 476, the Chief Judge declined to limit the scope of the proceeding.

[7] An amended statement of claim was filed on 28 July 2005. In addition to the causes of action contained in the original statement of claim, it also contained detailed allegations of bullying and other actions to Mrs Gates' disadvantage said to have occurred on numerous occasions between June 2001 and 14 February 2002.

[8] There followed a very lengthy series of interlocutory procedures which occupied more than three years. By the time a final fixture was allocated in June 2008, these had resulted in a further interlocutory judgment (AC 15/07) and another 14 judicial minutes.

[9] On 29 October 2008, Mr Thompson wrote to the Registrar requesting a further conference to deal with what he described as a "*jurisdictional bar*" to Mrs Gates' claim of bullying arising out of s114(6) of the Employment Relations Act 2000. In a minute dated 3 November 2008, I directed that this and other objections to jurisdiction raised by Mr Thompson be dealt with as part of the substantive hearing.

Jurisdictional Issues

[10] On behalf of Air New Zealand, Mr Thompson raised three jurisdictional issues relating to the cause of action based on bullying which was introduced into the amended statement of claim filed on 28 July 2005. The first two issues arise out of s114, the material parts of which are:

114 Raising personal grievance

- (1) *Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.*
- (2) *For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.*

...

- (6) *No action may be commenced in the Authority or the court in relation to a personal grievance more than 3 years after the date on which the personal grievance was raised in accordance with this section.*

[11] Mr Thompson submitted that a personal grievance alleging bullying was not raised within 90 days of the dates on which it was said to have occurred. In the alternative, he submitted that no “*action*” in respect of bullying was commenced in the Authority or the Court within 3 years of the date on which a personal grievance alleging bullying was raised.

[12] The third issue arises out of s179(1) which provides:

179 Challenges to determinations of Authority

- (1) *A party to a matter before the Authority who is dissatisfied with the determination of the Authority or any part of that determination may elect to have the matter heard by the court.*

[13] Mr Thompson submitted that s179(1) limits the scope of a challenge to matters which were before the Authority and that, in this case, bullying was never before the Authority.

[14] In order to put the evidence relevant to these issues into context, it is useful to understand the manner in which Mrs Gates has been represented at different times:

- a) While she was employed by Air New Zealand, Mrs Gates was a member of the Service and Food Workers Union. On occasions during the last 6 months of her employment, organisers and/or delegates of that union attended meetings at which Mrs Gates was present or at which issues relating to her were discussed. There was no evidence that Mrs Gates formally appointed the union or its officers to represent her in any of her concerns but the union did have specified roles under the collective agreement which applied to Mrs Gates’ employment.

- b) In late 2001, Mrs Gates instructed Short & Co, solicitors. Mr Burcher of that firm wrote a letter to Air New Zealand on her behalf on 21 December 2001.
- c) After her employment was terminated in April 2002, Mrs Gates engaged Employment Dispute Services to represent her. Mr Akbar of that firm wrote at least two letters to Air New Zealand on Mrs Gates' behalf and appears to have represented her also at mediation on 15 July 2002.
- d) Mrs Gates then engaged another advocate, Helen Thorpe, to represent her. Ms Thorpe lodged the proceedings in the Authority and represented Mrs Gates throughout the Authority's investigation. Ms Thorpe then filed the original statement of claim in the Court in May 2004 and continued to represent Mrs Gates until about May 2005.
- e) In May 2005, Mrs Gates instructed Gaze Burt Lawyers and Mr Clemow of that firm represented her until September 2006. The amended statement of claim which was filed on 28 July 2005 was filed by Mr Clemow.
- f) From 28 September 2006 on, Mrs Gates conducted the litigation in person.

[15] In the course of the hearing, I was provided with a large number of documents. Many of them were referred to by witnesses, by Mrs Gates and by counsel. Having considered all of the documents in the light of what has been said about them, it is apparent that the following are relevant to the first two jurisdictional issues:

- a) A letter dated 1 November 2001 from Mrs Gates to David Whittaker, who was then the Financial Services Centre Manager for Air New Zealand in Auckland. The letter began:

"I would like to make an official complaint. Please refer to attached notes highlighting the build up over some considerable time.

I find both actions and treatment towards me by Kim Hawkins unprofessional and unjustified."

Attached to the letter was a five page, detailed summary of events said to have occurred between 31 July and 24 October 2001.

- b) A letter from Mr Burcher of Short & Co to Mr Whittaker dated 21 December 2001. This began:

We advise we act for Linda Gates and have done for many years. She has recently consulted us in relation to difficulties she is having as an Accounts Clerk with Air New Zealand. She has consulted us over a number of issues including whether behaviour towards her by her supervisor may amount to harassment.

The letter went on to refer to a memorandum Mr Whittaker had sent to Mrs Gates on 12 November 2001 following investigation of the issues raised by Mrs Gates in her letter of 1 November 2001. Mr Burcher then asked a series of questions, the answers to which he said Mrs Gates needed *"before she can finally put this unfortunate experience behind her"*. Mr Burcher also sought a meeting with Mr Whittaker and other members of Air New Zealand management *"in order to bring final resolution to this matter"*.

- c) A letter dated 14 May 2002 from Mr Akbar to Carolyn Tremain, then Senior Vice President, Human Resources at Air New Zealand. This explicitly raised personal grievances alleging unjustified dismissal and unjustified disadvantage. In the context of a two page letter, there was the following paragraph:

In recent times our client has experienced difficulties in the workplace from certain individuals and has been subjected to humiliation, bullying and harassment which constituted disadvantage. She particularly attributes her difficulties to Kim Hawkins and David Whittaker.

- d) A letter dated 7 August 2002 from Mr Akbar to Graeme Norton, Air New Zealand's company solicitor. This letter dealt specifically with Mrs Gates' disadvantage grievance and included the paragraph:

Mrs Gates has suffered victimisation, humiliation, bullying and harassment continuously since June 2001. Despite raising her concerns, they were never addressed by Air New Zealand.

There followed a lengthy paragraph containing particulars of these complaints, most of which were those referred to in the summary attached to Mrs Gates' letter of 1 November 2001. It also alleged inaction in response to complaints of bullying.

- e) The statement of problem lodged with the Authority on 20 December 2002. This included a detailed narrative of events said to give rise to Mrs Gates' personal grievances but made no reference to harassment or bullying or to any of the events which Mrs Gates had previously described in her complaints of bullying. After the allegations of fact, the statement set out a "*Summary of the Applicant's personal grievance claims*". This was also detailed and, again, made no reference to any claim of harassment, bullying or similar complaint. As part of the standard form, the statement went on to say:

"The Applicant attaches the following documents (which the Applicant thinks are relevant to the problem):

- 1. Letter dated 14th May 2002, which raised the personal grievances.*

As indicated, a copy of Mr Akbar's letter to Ms Tremain dated 14 May 2002 was attached to the statement of problem.

- f) A letter dated 10 September 2003 from Ms Thorpe to a Support Officer of the Authority. This letter was written in response to a minute from the Authority inviting Mrs Gates "*to explain the basis of her view that the specifics of the numbers of staff and how this has changed overtime provided by the Respondent is inaccurate.*" In this

context, Ms Thorpe's letter contained numerous pieces of information and documents. Towards the end of the second page of the letter was the sentence "*September 2001 was when the workplace bullying reached its climax and the Applicant was on sick leave ...*".

- g) The Authority's determination dated 26 April 2004 which contains no reference to any issue of harassment or bullying having been raised and no record of any evidence of what might be described as harassment or bullying. The only possibly relevant reference in the determination was under the heading "*Chronology of Events*" where the Authority noted "*It is also relevant background that Ms Gates had experienced some problems within her department and had, by late 2001, expressed a wish to reduce to part-time work.*"
- h) The statement of claim filed in the Court on 24 May 2004. This was essentially identical to the statement of problem filed in the Authority except that the summary of Mrs Gates' personal grievances towards the end of the statement was expanded to include an allegation of discrimination on the grounds of disability in relation to consideration for alternative employment. The document as a whole contained no reference to harassment or bullying or any statement which might be construed as such a reference. Quite properly, no documents were attached to the statement of claim.
- i) The amended statement of claim filed on 28 July 2005. This contained a detailed claim of bullying.

[16] In *Clark v Nelson Marlborough Institute of Technology* CC 12/08, 19 August 2008 I discussed what is required to "*raise*" a personal grievance for the purposes of the Employment Relations Act 2000. Whether a particular complaint made by an employee is a "*personal grievance*" depends solely on whether it falls within one of the definitions of that term in s103. Whether a personal grievance has been raised and when this occurred are to be decided in accordance with s114(2).

[17] In this case, I find as a fact that Mrs Gates raised a personal grievance when she submitted her letter of 1 November 2001 to Mr Whittaker. The allegation made was of “*unprofessional and unjustified*” treatment of Mrs Gates by her supervisor, Ms Hawkins. Coupled with the detail provided in the attached notes, this satisfied the definition of a personal grievance in s103(1)(b) which is:

103 Personal grievance

(1) For the purposes of this Act, **personal grievance** means any grievance that an employee may have against the employee's employer or former employer because of a claim—

...

(b) that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer; or

...

[18] It was implicit in Mrs Gates' description of her concerns as “*an official complaint*” that she wanted her employer to address the matters raised. It therefore satisfied the requirements of s114(2).

[19] Mr Akbar's letter of 14 May 2002 also undoubtedly raised personal grievances on Mrs Gates' behalf. Those alleging unjustifiable dismissal and disadvantage in the restructuring process were clear. It is problematic, however, whether that letter was effective to raise a further grievance of bullying and harassment. The letter explicitly referred to “*humiliation, bullying and harassment which constituted disadvantage*” but did so in the context of the following passage

Our client commenced employment with Air New Zealand on 19 December 1977. She has had an excellent record with the company.

In recent times our client has experienced difficulties in the workplace from certain individuals and has been subjected to humiliation, bullying and harassment which constituted disadvantage. She particularly attributes her difficulties to Kim Hawkins and David Whittaker.

Despite raising on many occasions with David Whittaker the problems faced by our client since June 2001, no action was ever taken. However, our client was astonished at the speed at which others grievances were addressed.

[20] No specific events were identified as constituting bullying or harassment and the letter then went on to provide detail of the allegations arising out of the restructuring. In my view, this letter did raise a personal grievance of bullying and harassment but the scope of that grievance was limited by the lack of particulars provided. It was also limited by the time at which it was raised. The letter was dated 14 May 2002 but there was no evidence given of how it was sent to Air New Zealand or when it was received. Even if the letter was delivered on the day it was written, the 90 day requirement of s114(1) meant that it could not effectively raise a personal grievance in relation to events prior to 14 February 2002. Reference to events prior to that date could only be by way of background to the personal grievances arising out of the restructuring which were clearly intended to be the principal issues.

[21] Mrs Gates' overall claim must also be limited to the matters pleaded in the amended statement of claim. That deals with the allegation of bullying itself in paragraph 21. What is presumably intended to be background to that allegation is contained in paragraphs 9 to 20, while allegations that management of Air New Zealand failed to properly address Mrs Gates' complaints of bullying are made in paragraphs 22 and 23. The latest date on which any specific event relied on for any of those allegations is said to have occurred is 15 January 2002.

[22] It follows that the only claims before the Court relating to bullying which are based on a validly raised personal grievance are those particularised in Mrs Gates' letter of 1 November 2001.

[23] The next issue is whether the Court has jurisdiction to decide those claims. This depends on whether they are before the Court in a manner consistent with s114(6), that is whether they formed part of an "*action ... commenced in the Authority or the Court*" in relation to that personal grievance no later than 1 November 2004.

[24] The term “*action*” is not defined in the Employment Relations Act 2000 but its meaning in this context is clear. It is a legal proceeding to enforce a right or to seek redress for a wrong.

[25] Section 158 provides that “*Proceedings before the Authority are to be commenced by the lodging of an application in the prescribed form.*” The prescribed form is a statement of problem – see regulations 5 and 6 and form 1 of the Employment Relations Authority Regulations 2000.

[26] Where a matter is put before the Court by way of a challenge to a determination of the Authority, proceedings are commenced by filing a statement of claim – see regulation 7 and form 1 of the Employment Court Regulations 2000.

[27] A statement of claim in the Court is in a traditional form similar to that used in the High Court. The claims made and the allegations of fact relied on for those claims must be explicitly pleaded in a manner which fully and fairly informs the Court and the defendant. Any change to a statement of claim must be filed and served by means of an amended statement of claim. In this case, there is no doubt that the original statement of claim filed on 24 May 2004 made no claim of bullying or harassment. That statement of claim effectively defined the scope of the proceedings until the amended statement of claim was filed. It follows that an action was only commenced in the Court in relation to the allegation of bullying when the amended statement of claim was filed on 28 July 2005.

[28] The position in the Authority is not quite so clear. While the applicable regulations prescribe a specific form for a statement of problem, the form itself is different to a statement of claim in the Court. The substantive part of the form consists of four paragraphs to be completed by the applicant:

- 1 *The problem (or matter) that I wish the Authority to resolve is:*
- 2 *The facts that have given rise to the problem (or matter) are:*
- 3 *I would like the problem (or matter) to be resolved in the following way:*
- 4 *I attach copies of the following documents (which I think are relevant to the problem):*

[29] Paragraphs 1 and 2 have a footnote which reads:

Give enough detail to ensure that the Authority and the respondent are fully, fairly, and clearly informed.

[30] Paragraph 4 has the footnote:

List here all the documents that are attached, eg, your employment agreement or letters that you wish to rely on, or documents required under any other legislation, etc.

[31] For the purposes of s114(6), the scope of the action commenced by lodging the statement of problem must be decided taking into account the form as a whole, including any attachments. In most cases, the attachments will be in the nature of evidence supporting the allegations made in paragraphs 1 and 2 of the form. In some cases, however, allegations made in attached documents may be incorporated by reference into paragraphs 1 and/or 2. For example, an applicant may say in paragraph 2 that the facts which have given rise to the problem are set out in an attached letter previously sent to the respondent.

[32] In this case, Mr Akbar's letter of 14 May 2002 was attached to the statement of problem and listed in paragraph 4. The letter referred to bullying and harassment. In the context of the statement of problem as a whole, however, I find that the contents of that letter did not expand the scope of the proceeding from that set out in paragraphs 1 and 2 of the form. Those paragraphs were completed very fully and in detail. In particular, the part of the statement providing the requirements of paragraph 2 concluded with the heading "*Summary of the Applicant's personal grievance claims*" followed by 5 very specific paragraphs, each clearly describing a different grievance. Mr Akbar's letter was probably attached to the statement of problem simply as evidence that the personal grievances which were described in the statement had been raised in time.

[33] I find that the statement of problem dated 18 December 2002 did not commence an action in the Authority in relation to a personal grievance that Mrs Gates' employment had been affected to her disadvantage by bullying.

[34] The manner in which a proceeding before the Authority may change in its nature and scope also differs from the Court. It is rare for a statement of problem to be formally amended and changes are usually made by memorandum or letter or even orally in the course of an investigation meeting. This relative informality is consistent with the nature of the Authority and of its jurisdiction.

[35] Section 143 sets out the objects of Part 10 of the Act which establishes the institutions and defines their jurisdiction and powers. One of those objects is to:

- (f) *recognise that judicial intervention at the lowest level needs to be that of a specialist decision-making body that is not inhibited by strict procedural requirements...*

The “*specialist decision-making body*” referred to in this object can only be the Authority.

[36] Consistent with that object, s157(1) provides:

157 Role of Authority

- (1) *The Authority is an investigative body that has the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities.*

[37] In this case, that raises the question whether the scope of the proceeding before the Authority was informally altered in the course of the investigation to include a personal grievance based on bullying. Mrs Gates submitted that the letter from Ms Thorpe to the Authority dated 10 September 2003 had this effect. Having regard to all the evidence, I do not accept that submission. The letter was written in response to an offer by the Authority of an opportunity to substantiate an allegation of fact and must be read in that context. The reference to bullying was incidental and it was not suggested in the letter that the scope of the claims being investigated by the Authority be expanded. Had a new claim been introduced during the investigation, the Authority would undoubtedly have referred to it in its determination. The determination contains no reference at all to such a claim or to evidence related to such a claim. This is consistent with evidence given to the Court

by witnesses present at the Authority's investigation meetings that no evidence of this nature was given.

[38] For these reasons, I find that no action was commenced in the Authority or the Court in relation to a personal grievance that Mrs Gates' employment was affected to her disadvantage by bullying within the 3 year period after the grievance was raised. It follows that the incorporation of a claim based on that personal grievance in the amended statement of claim was contrary to s114(6) and that the Court has no jurisdiction to determine it.

[39] I note that, in the course of the hearing before me, the meaning of s114(6) and its significance in this case was carefully explained to Mrs Gates on more than one occasion. Her attention was also drawn to s221 which gives the Court jurisdiction to extend the time within which anything is required to be done. Mrs Gates was invited to make an application for an extension of time in this case but she did not do so.

[40] Having decided that Mrs Gates was prevented from pursuing her personal grievance of bullying by operation of s114(6), it is not necessary for me to decide Mr Thompson's third objection based on s179 and I do not do so.

[41] Although Mrs Gates is not entitled to advance her personal grievance of bullying, I nonetheless have regard to the evidence adduced in support of it by way of background to Mrs Gates' other claims arising out of the restructuring.

Substantive issues

[42] Putting aside her personal grievance of bullying, the two remaining aspects of Mrs Gates' claim are:

- a) That her dismissal was unjustifiable because her position was not genuinely redundant.
- b) That the process leading up to the decision to terminate her employment was unfair because Air New Zealand failed to make

sufficient effort to find her alternative employment once it became foreseeable that her position was redundant.

Background

[43] Mrs Gates was first employed by Air New Zealand in December 1977 and worked continuously for the company until 26 April 2002. She worked in the accounts payable office in central Auckland. In 2001, there were approximately 15 staff in that office.

[44] The position occupied by Mrs Gates was known as Hotpac and World Wide Insurance Clerk. This title reflected the nature of her work which had two components. The first involved what were known as Hotpac vouchers. These were the vouchers issued to customers of Air New Zealand for services sold as part of travel packages and which were purchased from other suppliers. Each day, copies of vouchers would be received from Air New Zealand's retail travel centres around the country. Mrs Gates' task was to collate them and check them off against computer generated records of sales made by each travel centre. Each week, she would do a reconciliation and initiate the process for payment of the service providers.

[45] The second part of Mrs Gates' job related to travel insurance sold by travel centres. Each day, copies of documentation relating to each policy sold would be received from the travel centres. As with the Hotpac vouchers, Mrs Gates would check these off against the computer sales records for the travel centres and reconcile them weekly before initiating payment to the insurance company.

[46] In addition to these routine tasks, Mrs Gates would be required from time to time to investigate and resolve any issues relating to the two types of vouchers she dealt with. This was usually done by telephone.

[47] One of the other staff employed in the same office as Mrs Gates was Linda Bearman. Her position was that of Wholesale Payments Clerk. In this role, she processed vouchers for travel products sold by the Air New Zealand travel centres

sourced through wholesalers. These sales were reconciled with the daily sales records and then entered into Air New Zealand's financial data system for payment.

[48] Mrs Gates and Mrs Bearman were familiar with each other's work and, from about 1998, each would provide backup to the other during leave or other absence. This arrangement operated amicably and successfully until mid 2001.

[49] As well as being work colleagues, Mrs Gates and Mrs Bearman had a measure of personal friendship. In early 2001, however, this changed. For reasons unrelated to their work and which need not be recorded here, their friendship came to an abrupt end. Mrs Bearman reacted by refusing to communicate with Mrs Gates except as absolutely necessary for their work. Mrs Gates reacted by complaining about Mrs Bearman's conduct. In particular, Mrs Gates complained that Mrs Bearman did not give sufficient notice when she was going to be away and that this made it difficult to back up her work.

[50] In June 2001, Kim Hawkins took up the role of Accounts Payable Team Leader. In this role, she was responsible for supervising the work of all members of the team, including Mrs Gates and Mrs Bearman. From the time Ms Hawkins started in that role, she received complaints from Mrs Gates about Mrs Bearman and the back up issue. As time went on, Mrs Gates also complained about other issues, an example being the time taken by other staff for tea breaks. Ms Hawkins also received complaints from other staff about Mrs Gates. Examples included singing or humming when listening to music through headphones while doing her work and using an alarm clock to remind her when tasks were to be done. Although these complaints were about apparently minor issues, they led to tension in the office which Ms Hawkins properly sought to address.

[51] Over the next several months, Ms Hawkins took a series of practical steps to reduce tension in the office. These included making alternative arrangements for backing up Mrs Bearman's work in her absence. Ms Hawkins also discussed Mrs Gates' concerns with her in an effort to resolve them. Mrs Gates regarded many of these efforts, together with other relatively routine interactions, as bullying by Ms Hawkins. A great deal of detailed evidence was given about these events. As their

significance in this case is only by way of background, I do not record that evidence. The clear conclusion I reached after hearing and considering all of that evidence, however, is that there was no substance to Mrs Gates' allegation of bullying. It was clear to me that, while there were undoubtedly interpersonal problems in the office, they arose largely out of the tension between Mrs Gates and Mrs Bearman and out of Mrs Gates' unusual behaviour in the workplace. I also formed the clear view that Ms Hawkins acted constructively and, for the most part, appropriately in her efforts to restore harmony and efficiency in the office.

[52] On 1 November 2001, Mrs Gates made a formal complaint about Ms Hawkins to Mr Whittaker. He reacted appropriately by promptly investigating the issues raised by Mrs Gates. On 12 November 2001, he wrote to Mrs Gates setting out the results of his investigations and telling her of the action he intended to take. This included further training for all managers in the financial services sector of Air New Zealand and initiating consultation about a set of ground rules for behaviour in the office. Those ground rules were subsequently developed and made known to all staff.

[53] Notwithstanding the efforts by Ms Hawkins and Mr Whittaker to settle the situation in the accounts payable office, tensions remained. I am satisfied, however, that this was between individual staff members and was not encouraged or condoned by management. I am also satisfied that the interpersonal issues in the accounts payable office were not a factor in the restructuring process which led to the disestablishment of Mrs Gates' position and the subsequent termination of her employment on grounds of redundancy.

Was the redundancy genuine?

[54] Mrs Gates' claim that the position of Hotpac and World Wide Insurance Clerk was not genuinely redundant in March 2002 was based on the proposition that the work associated with the position remained to be done for at least 12 months afterwards and was done by other staff. To an extent, that proposition is correct and was not disputed by Air New Zealand. That fact alone, however, does not inevitably

lead to the conclusion that the position was not redundant. To determine the issue, it is necessary to traverse the evidence of the events leading to the decision.

[55] In late 2000, Air New Zealand acquired the Australian based airline, Ansett. That led to a review of many of Air New Zealand's operations in order to accommodate the additional work and with a view to achieving economies. Accounts payable was one of the departments subject to review for these reasons.

[56] Beginning in mid-2001, the structure of accounts payable was also being reviewed for internal reasons. The existing structure was a vertical one in the sense that an individual staff member was responsible for handling a particular type of transaction or the work associated with a particular account through all stages. This was found to create problems when a staff member was away. To address this, an alternative structure in which staff worked in groups, each handling a part of the process for a range of transactions or accounts, was being considered.

[57] A third factor which directly affected the position held by Mrs Gates was the potential for automation. The Hotpac vouchers were in a form known as a multi purpose document. Such documents were used for a range of transactions and processing of them had been automated for virtually all purposes other than those used as Hotpac vouchers. In mid-2001, work began on automating the Hotpac vouchers. At around the same time, electronic processing of the World Wide Insurance work was being considered.

[58] In September 2001, Air New Zealand was seriously affected by two events: the World Trade Centre tragedy on 11 September 2001 and the collapse of Ansett a few days later. This put Air New Zealand under severe financial pressure which was only partly relieved by the Government's investment in the company. These two events gave increased importance to the need to achieve all economies reasonably possible.

[59] Although Mrs Gates was employed full time in the position of Hotpac and World Wide Insurance Clerk, it was perceived that the work required in the role was far from full time. Whether this perception was accurate was the subject of a good

deal of evidence. Several witnesses said that the role was much less than full time. These included Mrs Bearman and Ms Hawkins who both had a good knowledge of the work. Several witnesses also gave evidence that Mrs Gates herself freely acknowledged during the latter part of 2001 that her role was no more than part time. Mrs Gates denied that she had said this but, when the proposition that her role was no more than half time was put to her squarely in cross examination, she did not contradict it.

[60] Work on automating both aspects of the work done by Mrs Gates reached the point of practical trials in early 2002. Some difficulties were encountered but, by mid-February 2002, the technical advice received by management was that those difficulties were minor and would be overcome. By mid-March, that continued to be the likely outcome and the decision was made to disestablish the position of Hotpac and World Wide Insurance Clerk.

[61] As things turned out, what were initially regarded as “glitches” in processing the Hotpac and World Wide Insurance work electronically proved to be more difficult to overcome than anticipated. That difficulty related in part to the nature of the software then being used by Air New Zealand for its general accounting. When a decision to replace that software was made later in 2002, attempts to integrate the Hotpac and World Wide Insurance work were suspended until new general accounting software was in place. For the balance of 2002, therefore, the work continued to be done manually.

[62] In this way, Mrs Gates was correct to say that the work she did was still required to be done after her employment was terminated. On the other hand, the evidence was clear that only 5 to 6 hours per week was required to complete these tasks after Mrs Gates left. This work was done by other existing staff in the accounts payable office. No new staff were employed in accounts payable after Mrs Gates left. On the contrary, staff numbers continued to reduce during 2002.

[63] This was clearly a genuine redundancy. Whether or not the work being done by Mrs Gates was automated, it was clear that it was far less than a full time job. That fact and the fact that the work was readily absorbed into the roles of other

existing staff after Mrs Gates left demonstrate that the role was genuinely surplus to the requirements of Air New Zealand. Disestablishing the position saved money for Air New Zealand and there can be no doubt that the company had good reason to reduce its costs at that time.

Was the process fair?

[64] In the amended statement of claim, the allegations of unfair process are confined to events which occurred on or after 20 February 2002. In order to put those events into context, however, it is necessary to traverse some of the background to those events.

[65] As noted earlier, the review of operations within Air New Zealand arising out of the acquisition of Ansett and the review of the structure of the accounts payable department both began in early 2001. The work to automate processing of Hotpac vouchers began in mid-2001 and, from the same time, consideration was being given to processing World Wide Insurance transactions electronically. By August 2001, the possibility that Mrs Gates' position might be eliminated was sufficiently clear that Ms Hawkins discussed it with Mrs Gates' union.

[66] Mrs Gates knew of these events. Although she attempted to minimise the extent of her knowledge in her evidence, I find that she was aware during the second half of 2001 that her work may disappear and that, as a result, her position may be disestablished. This was certainly made clear to her by Mr McCloskey in discussions he had with Mrs Gates in late 2001 and early 2002.

[67] In early 2002, Mr McCloskey made informal enquiries within Air New Zealand to see whether there may be another position available for Mrs Gates in the event that her position was made redundant. Mrs Gates had told Mr McCloskey that she would prefer a part time role and he tried to accommodate her wish. On 14 February 2002, Mr McCloskey sent an email to Mrs Gates informing her of a possible clerical role in what was known as the Employee Lifecycle Department. An employee in that department was leaving and Mr McCloskey noted that he may be able to negotiate a part time role for Mrs Gates as her replacement. When Mr

McCloskey asked Mrs Gates whether she was interested in this position, her enigmatic reply was “*I do know exactly what I want and exactly where I would like to go and am prepared to continue until the opportunity arises... (Good things come to those who wait).*”

[68] It emerged that what Mrs Gates wanted was a clerical position in the cargo handling department of the company. In particular, she set her sights on a position at Auckland airport working 3 days a week.

[69] On 20 February 2002, Mr McCloskey, Mr Whittaker and Ms Hawkins held a meeting with Derek Craig, an organiser from the Service and Food Workers Union and Heather Burton, the accounts department delegate for that union. One of the topics discussed was the likely redundancy of Mrs Gates’ position. At Mrs Burton’s suggestion, Mrs Gates was asked to join the meeting and the situation was explained to her. Mrs Gates said that this was the first indication she had that her employment was at risk but I do not accept that evidence. All of the other people present at the meeting gave evidence that Mrs Gates was not only unsurprised but pleased at the prospect of redundancy. The evidence was also clear that Mrs Gates had previously discussed redeployment with Mr McCloskey

[70] Notes of the meeting on 20 February 2002 record that, when asked about her preferences for alternative employment, Mrs Gates said that she wanted a part time position in cargo and elaborated on the particular duties she would prefer. This led to a discussion about compensation for partial redundancy if Mrs Gates could be found the part time position she wanted. Other redeployment possibilities were also discussed.

[71] In the course of this meeting, Mr Craig raised the possibility of a “*redundancy swap*”. Mrs Gates had found out that an employee in cargo wanted to leave and was willing to do so if she was paid redundancy compensation. Mrs Gates suggested to Mr Craig, apparently some time in late January 2002, that if she and the woman in cargo were to exchange positions, the other woman could receive redundancy compensation and Mrs Gates would have the job she wanted. Mr Craig was dubious about this prospect and only raised it with management because Mrs

Gates had raised it with him. At the meeting on 20 February 2002, the members of management present agreed to check whether Air New Zealand had a company policy on such matters.

[72] The first of Mrs Gates' specific allegations of unfairness arises out of this meeting. In the amended statement of claim, she alleged that she was told at the meeting on 20 February 2002 that Air New Zealand was considering making her position redundant or transferring it to the Travelcentre Services Department and that, shortly after the meeting, Mr McCloskey told her that she "*would not be happy*" in the Travelcentre Services Department. The alleged unfairness in this was said to be that Mrs Gates was not given a fair opportunity to assess whether she would like to transfer to the Travelcentre Services Department.

[73] Having heard the evidence, it is clear that this allegation was made on the basis of a misunderstanding of events. I am satisfied that what was said at the meeting on 20 February 2002 was that, if the automation proceeded, Mrs Gates' position would very largely disappear. Such aspects of the Hotpac work which remained would be absorbed by other accounts payable staff and the small amount of processing required of World Wide Insurance documents would be done in the travel centres. There was never any suggestion that all or part of the work Mrs Gates did would be taken over by Travelcentre Services and, to the extent Mrs Gates understood that to be so, she was mistaken or confused the travel centres themselves with the department called Travelcentre Services. There was never any possibility of Mrs Gates transferring to Travelcentre Services and it follows that she cannot have been disadvantaged with respect to such a possibility.

[74] Following the meeting on 20 February 2002, Mr McCloskey made inquiries about possible redeployment opportunities for Mrs Gates in cargo. At that stage, there were no positions available but Mr McCloskey arranged for Mrs Gates to send her CV to the Human Resources Manager in that area in case a position became available.

[75] On 8 March 2002, there was a further meeting involving Mr McCloskey, Mrs Gates, Ms Hawkins, Mr Whittaker, Mr Craig and Mrs Burton. Mr McCloskey told

Mrs Gates that it was looking increasingly likely that her position would be disestablished and the reasons for this were again provided in detail. Discussion then turned to redeployment possibilities. Mrs Gates reiterated her interest in going to a part time position in cargo but, at that stage, no opportunities had emerged.

[76] There was also discussion of a position within accounts payable doing scanning of documents. The possibility of such a position being created had been raised at a weekly accounts payable team meeting on 20 February 2002. It had been recorded in the minutes of that meeting that a "*new staff member*" would be employed and that staff could apply if they were interested. Mrs Gates had not been present at the meeting in question but sent an email to Mr McCloskey enquiring about this possible new position. As at 8 March 2002 this possibility had not eventuated and it subsequently never did. The scanning work was done by various staff within the accounts payable department. No new staff were employed to do this work.

[77] The second specific allegation of unfairness relates to this meeting. In paragraph 32 of the amended statement of claim, Mrs Gates alleged that, at the meeting on 8 March 2002, Ms Hawkins stated that there were no positions in the accounts payable department that Mrs Gates could apply for and that such a statement was false and misleading. This allegation was not supported by any evidence and must therefore be rejected. I note that it is also inconsistent with evidence about what was said at a subsequent meeting.

[78] On 13 March 2002, there was a third meeting between Mr McCloskey, Mrs Gates, Mr Craig and Mrs Burton. At that meeting, Mr McCloskey told Mrs Gates that a decision had been made to disestablish her position and gave her 6 weeks' notice of termination of her employment if she could not be redeployed. That period of notice was to conclude on 26 April 2002. Mr McCloskey also told Mrs Gates that Air New Zealand would not approve the redundancy swap she had earlier enquired about through Mr Craig.

[79] There was then another discussion about redeployment possibilities. The evidence of Mr McCloskey was that he raised the possibility of creating an

alternative role for Mrs Gates in accounts payable by terminating the employment of some temporary staff and making their work available to Mrs Gates as a permanent position. Mr McCloskey said that Mrs Gates immediately rejected this possibility, saying that she did not want another job in accounts payable and that she was interested in a part time job in cargo. Mr Craig and Mrs Burton also gave evidence that they recalled the offer of an alternative position in accounts payable being made and Mrs Gates firmly rejecting it. Mrs Burton also specifically recalled Mrs Gates linking the rejection of that option with her desire to get a part time position in cargo. In her evidence in chief, Mrs Gates did not mention this offer but, when it was put to her in cross examination, she denied that such a discussion ever took place. On this issue, I prefer the evidence of Mr McCloskey, Mr Craig and Mrs Burton. I find as a fact that Mrs Gates was offered a permanent alternative position in accounts payable which she rejected.

[80] Mrs Gates was due to take annual leave from 18 March until 2 April 2002. In the course of the meeting on 13 March 2002, she asked if she could cease work when she began that period of leave and be paid in lieu of the balance of the period of notice. Mr McCloskey agreed to this.

[81] The following day, 14 March 2002, Mr McCloskey became aware that 4 positions in cargo had been approved and were to be filled. He promptly sent Mrs Gates an email telling her about these positions and encouraging her to make contact with the staff who were managing the recruitment process. Mrs Gates was subsequently interviewed for those positions but was not appointed. Although not explicitly pleaded in the amended statement of claim, it was part of Mrs Gates' case that she ought to have been appointed to one of these positions and the fact that she was not appointed was unfair.

[82] In this regard, Mrs Gates relied on clause 113.1.2 of the collective agreement applicable to her employment by Air New Zealand. It provided:

The Company and the Union recognise that it is desirable for the employees to have continuing employment. To this end, the Company, the Union and the employee will make every effort within reason to find suitable alternative employment.

[83] This paragraph appears under the heading "*Intent of Agreement*" and, in my view, was principally intended to be an aid to interpretation of the subsequent operative provisions of the agreement rather being an operative provision in itself. To the extent it might be thought to impose obligations on the parties directly, however, it was a broad, mutual obligation limited to what was reasonable. If the decision not to appoint Mrs Gates to one of the cargo positions for which she applied in March 2002 was reasonably explicable, there was compliance with the agreement.

[84] One of the people who managed the recruitment process for the positions in cargo was Keri Johnstone. She gave detailed evidence of the selection process and of the reasons why Mrs Gates was not appointed. She also produced notes made in the course of the interview which she and a manager conducted with Mrs Gates. This evidence was largely unchallenged and I am satisfied by it that Mrs Gates lacked the particular skills, experience and personal attributes required for the cargo positions. It follows that the decision not to appoint Mrs Gates was reasonable or, put another way, that a decision to appoint Mrs Gates would not have been reasonable.

[85] In early April 2002, Mrs Bearman moved to a different role within the accounts payable department. The next aspect of Mrs Gates' claim was that she should have been offered the role vacated by Mrs Bearman. I do not accept that proposition. The evidence was that the majority of the work previously done by Mrs Bearman was taken over by another existing employee in accounts payable. The balance was spread amongst other existing staff. The number of staff within the department remained the same. The change which occurred, therefore, was simply a rearrangement of duties amongst existing staff. There was no vacancy.

[86] The final aspect of Mrs Gates' claim of unfair process was that, when a further position in cargo became available, she was not informed of that fact. Mrs Gates' evidence in support of this allegation was that the position referred to became available in May 2002. That was after her employment had been terminated on grounds of redundancy on 26 April 2002. The claim, therefore, is one of failure to offer her re-employment or to advise her of an opportunity for possible re-employment.

[87] There is no general obligation on an employer who has dismissed an employee on grounds of redundancy to make the former employee aware of opportunities for re-employment or to give such a person preference for re-employment. It is, however, open to the parties to an employment agreement to include such an obligation in their agreement. In this case, there was a re-employment provision in clause 113.8 of the applicable collective agreement. That clause was qualified by the opening words of clause 113.8.1 which conferred the benefit of the clause on “*Employees made redundant and who have not declined a position as per Clause 113.6.1.3...*”.

[88] Clause 113.6.1 dealt with relocation of employees within Air New Zealand. The relevant parts of the clause were:

113.6.1 Employees in any area affected by redundancy may be given consideration for employment and if positions are available may be offered employment in another section, area or location in New Zealand.

Provided:

113.6.1.1 The employee is suitable for the vacancy.

113.6.1.2 A suitable alternative position shall be a position at a rate of wages and under minimum conditions of employment not less favourable than those which applied immediately prior to the transfer, unless at the employee's choosing after consultation with the Union.

113.6.1.3 That the refusal of such an offer by any employee of suitable alternative employment which is not similar or is at a different city in New Zealand shall not deny him or her their rights under this Agreement.

[89] Although this clause is poorly drafted, the only sensible meaning to be taken from it for the purposes of clause 113.8.1 is that employees who have declined an offer of suitable alternative employment which is similar and is in the same city are not entitled to the benefit of the re-employment provisions in clause 113.8.

[90] In this case, the position in accounts payable offered to Mrs Gates on 13 March 2002 was “*suitable alternative employment*” within the meaning of clause 113.6, it was similar to the position she then held and it was in the same city. As a result, she was not entitled to the benefit of clause 113.8. It follows that Air New

Zealand had no obligations to her in relation to re-employment and this last aspect of her claim of unfairness in the restructuring process must fail.

Conclusion

[91] In summary, my decision is:

- a) By operation of s114(6) of the Employment Relations Act 2000, the Court has no jurisdiction to decide Mrs Gates' personal grievance based on allegations of bullying.
- b) The position of Hotpac and World Wide Insurance Clerk held by Mrs Gates was genuinely redundant to the needs of Air New Zealand and the decision to disestablish the position was justifiable.
- c) The allegations of unfairness in the restructuring process made by Mrs Gates were not sustained on the evidence.
- d) Mrs Gates' challenge is dismissed.
- e) Although I have reached conclusions similar to those of the Authority, by operation of s183(2) the determination of the Authority is set aside and this decision stands in its place.

Comments

[92] In the course of the hearing, I heard oral evidence from 20 witnesses and received more than 250 documents. In considering my judgment, I have reviewed all of that evidence. Equally, I have had regard to the detailed submissions made by both Mrs Gates and Mr Thompson. In this judgment, however, I have only referred to that material necessary to decide the essential issues and to provide the background to those issues.

[93] The Employment Court is a court of record. The scope of any case is determined by the pleadings. In the course of the evidence, many issues were raised

which were not the subject of allegations in the amended statement of claim or necessary background to those allegations. While I allowed that evidence to be adduced, I have not referred to those issues in this judgment as they need not be decided.

[94] Mrs Gates' claims were based on personal grievances alleging that various actions of Air New Zealand were unjustifiable. In deciding these claims, I have applied the test of justification set out in s103A of the Employment Relations Act 2000:

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.

[95] Since the hearing concluded, Mrs Gates has sent several letters to the Registrar attaching further documents she wished me to consider in relation to the jurisdictional issues. At my direction, Mrs Gates was invited to make an application on notice for those additional materials to be admitted as evidence but she declined to do so. I have nonetheless looked at those documents. Many of them were produced in the course of the hearing. The others are purely administrative documents, such as covering letters to the Authority, and do not assist Mrs Gates' case.

[96] As a matter of practice, the Authority provides no documents to the Court when a determination of the Authority is challenged. As the issue of jurisdiction under s114(6) in this case turned on what occurred in the course of the Authority's investigation as well as in the course of the proceedings before the Court, I called for the Authority's file and considered it. I took that action pursuant to s189(2) which provides that the Court may call for and consider such evidence as it thinks fit. What the file shows is that the Authority conducted a very thorough investigation, including two meetings, extended correspondence with the parties' representatives and written submissions from them. That material confirms conclusively the impression given by the evidence presented in the course of the hearing in the Court

that allegations of bullying played no material part in the proceedings before the Authority. It is clear from the file that the claims made in the proceedings before the Authority were based entirely on events beginning with the meeting on 20 February 2002 and the very occasional references to prior events were only by way of background.

[97] In reaching my decision, I have had to resolve some conflicts of evidence about important issues. In most cases I have preferred the evidence of other witnesses to that given by Mrs Gates. There are several reasons why that is so. On several issues, Mrs Gates was contradicted not only by witnesses called by Air New Zealand but also by those she called herself. Mrs Gates was warned about the danger of calling such evidence but elected to proceed. Many of the witnesses who disagreed with Mrs Gates' evidence had no stake in the proceedings and were effectively neutral. On the key issue of whether Mrs Gates declined the offer of an alternative position at the meeting on 13 March 2002, this included an organiser and delegate of Mrs Gates' union. When cross examined, it was apparent that Mrs Gates had little actual recollection of many events. On some issues, the answers she gave were inconsistent with contemporary documents. Overall, I formed the view that much of Mrs Gates' evidence was the result of reconstruction rather than recollection.

[98] Notwithstanding these factors which caused me to seriously doubt the objective reliability of her evidence, I accept that Mrs Gates gave that evidence honestly in the sense that she genuinely believed that what she said was true.

[99] I regret that it has taken longer than I would have wished to complete this judgment. The delay has been largely due to the pressure of other matters before me and the consequent difficulty in finding sufficient time to properly review the large volume of evidence involved in this case.

Costs

[100] Defending this matter has undoubtedly put Air New Zealand to very considerable cost. Applying the accepted principles, the company is entitled to

receive a reasonable contribution to those costs from Mrs Gates, provided she has the ability to pay. In the unusual circumstances of this case, however, it may be that Air New Zealand is willing to compromise the position it is entitled to take. In the first instance, I invite the parties to discuss the issue of costs. If they are unable to agree, Mr Thompson is to file and serve a memorandum within 42 days after the date of this judgment. Mrs Gates will then have a further 28 days in which to file and serve a memorandum in response.

A handwritten signature in blue ink, appearing to be 'A A Couch', with a long, sweeping underline.

A A Couch
Judge

Signed at 11.00 am on 11 September 2009