IN THE EMPLOYMENT COURT
CHRISTCHURCH

CC 19/09
CRC 5/09

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	T & L HARVEY LTD (FORMERLY HARVEYS FLOORPRIDE LIMITED) Plaintiff
AND	LEANNE DUNCAN Defendant

Hearing: 19 and 20 November 2009
(Heard at Nelson)

Appearances: Nicole Ironside, Counsel for Plaintiff
P Norris and M Witt, Advocates for Defendant

Judgment: 20 November 2009

ORAL JUDGMENT OF JUDGE A A COUCH

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[1] The plaintiff is a flooring and soft furnishing retailer in Nelson. This is a long established business, which has been owned and managed overall for many years by Tom Harvey. Since 2004 there has also been a general manager in the business, Dean Folly.

[2] The defendant, Ms Duncan, was employed by the plaintiff in February 2004. Her principal role was to prepare quotes for customers using information provided by the salespeople. She also assisted with other general office duties. The job of producing quotes was done until 2007 using software known as Nimbus. This required a good deal of data to be inputted by Ms Duncan. She did the quotes for all six of the flooring sales staff.

[3] Another employee was Ms Thomson. She was initially employed in 2005 to do telephone, reception and general clerical duties but, shortly after she started, she took on doing the quote work for the two other sales staff who sold drapes. That was the position in mid 2007.

[4] At that time, the Nimbus software was nearing the end of its life. To keep using it, the plaintiff would need an extensive upgrade. An alternative was software known as CCM. This was a more comprehensive system which dealt not only with quotes but also with stock, accounts and other aspects of the business. It was described as an integrated system. CCM was designed to have the essential data inputted directly by sales staff rather than separately, as was being done by Ms Duncan and Ms Thomson using the Nimbus software.

[5] Mr Harvey recognised the benefits to the business of CCM, but he also recognised the likely impact on staff. From an early stage, he recognised that the duties of all staff would change if this software was introduced. The impact on Ms Duncan, and to a lesser extent Ms Thomson, was likely to be the greatest as most of the work involved with quotes would move from them to the sales staff.

[6] Mr Harvey addressed these issues in two ways. Firstly, he gave an assurance to all staff that, although their duties would change as a result of the introduction of the software, no one would lose their employment for that reason. Secondly, he asked the software supplier to modify CCM to facilitate all the primary quotation data still being entered by a person other than the sales staff. The effect of this would be to enable Ms Duncan and Ms Thomson to continue doing that work.

[7] The author of the software, Mr Pinkney, recommended against using CCM in this way but agreed to make the modifications requested by Mr Harvey. On this basis, CCM was introduced to the business. Training and preparatory work took place during July 2007 and the software was put into practical use from 1 August 2007. Subsequently, some further changes were made to enable Ms Duncan, in particular, to operate the software in a way which she found more convenient and quicker.

[8] Introducing this software to the business was a major event. It resulted in a good deal of upheaval and, to some extent, unhappiness. Some of this was due to the need to put a large amount of information into the database which underlies the software. There were also problems inherent in the software itself. It appears, however, that many other problems arose from the way in which the software had been modified and was being used, namely, inputting the data through Ms Duncan and Ms Thomson rather than through the sales staff.

[9] The combination of all these factors led to significant delays in quotes being processed. In early September 2007, Mr Harvey decided to progressively move to using the software in the manner it was originally intended, that is, sales staff putting the data into the system themselves.

[10] There was a dispute about how fully this decision was communicated to staff. Mr Harvey and Mr Folly said that this was fully explained in mid September. Ms Duncan says she was aware then that two sales staff were to input their own data but that she was not fully aware of the intention for all sales staff to do so until early October.

[11] As things turned out, this difference of recollection is of little moment and I do not need to resolve it. What is clear is that there was discussion from time to time between Mr Harvey and/or Mr Folly on the one hand and Ms Duncan on the other hand about how her role would change as a result of the implementation of CCM. Even once the decision had been made to use the software as originally intended, it was nonetheless known all along that two sales staff, named Gavin and Ross, would not do their own input work and that this work would stay with Ms Duncan.

[12] There were various suggestions by Mr Harvey and Mr Folly of other work that Ms Duncan might do, such as marketing, providing backup for accounts and providing further assistance to sales staff. These were the types of suggestions made during the period from the second week in September to the first week in October. Throughout the entire period from June to October 2007, Mr Harvey repeated on several occasions that the employment of all staff was not at risk as a result of the implementation of the new software.

[13] On 9 October 2007, Mr Harvey met with Ms Duncan. He said that he did so to discuss with Ms Duncan again what the future content of her job would be. He said that he wanted Ms Duncan to take over reception work and other general clerical duties from Ms Thomson and to move from her workstation towards the rear of the store to the reception area. Ms Duncan's initial reaction to this was very negative. She said in coarse terms that she did not want to do such work. She later apologised to Mr Harvey for the language she used but that was the end of discussion that day.

[14] On 11 October, Mr Folly wrote a letter to Ms Duncan on Mr Harvey's instructions. In that letter he recorded the problems the company had experienced in trying to operate CCM in a modified way and the decision to have sales staff input their own data in most cases. Mr Folly then went on to say:

> …
>
> *Therefore we feel the need to adapt your role by incorporating other duties, previously performed by other staff members. … Tasks within the role would include (but not be limited to) still processing certain quotes; assisting in the accounting/invoicing department; ordering of products; marketing in shop products/sales and promotions; reception duties, answering the phone and serving customers; receipting and recording payments; filing and other administration duties.*
>
> …

[15] The final part of the letter read:

> …
>
> *I understand that in the discussions up to now you have indicated that you are not interested in this new role, but I would like to urge you to please reconsider. Not only do we value you as a member of our staff, but you are also a well liked member of the team and we would obviously prefer to keep the skills, experience and personality you bring to Harvey's Floorpride.*
>
> *Please take the weekend to think about this and come back to me on Monday with your thoughts and decisions. You are also welcome to have a representative with you when you come to discuss this with me.*
>
> …

[16] That letter was signed by Mr Folly as general manager.

[17] There was a dispute about when this letter was given to Ms Duncan. Mr Folly says it was at the end of the working day on Thursday, 11 October. Ms Duncan says it was the end of the following day, Friday, 12 October. In the end little turns on this difference as the evidence is clear that Ms Duncan tried to contact Mr Norris and appoint him as her representative in relation to these matters on Friday but was unable to speak to him until Friday evening.

[18] Ms Duncan wanted Mr Norris to advise her and to represent her in the discussions Mr Folly had asked to have with her the following Monday. Unfortunately, Mr Norris was not available that day. It appears from the evidence that Ms Duncan became aware of that on the Friday evening but it was, of course, then the weekend and she was unable to raise this with Mr Folly until Monday morning.

[19] At 8.30 am on Monday, 15 October 2007, Mr Folly initiated a meeting with Ms Duncan. He wanted to know whether she accepted the position described in his letter of 11 October. It became clear at that point that the content of the position was not open to discussion. Mr Folly simply wished to know whether Ms Duncan accepted it or not. Ms Duncan told Mr Folly that she wanted the assistance of Mr Norris and that he was not available. In the meantime, she said that she was not prepared to accept the position as described.

[20] Mr Folly reported this back to Mr Harvey who then called a further meeting to be held that afternoon. Ms Duncan contacted Mr Norris to check again if he would be available but he was not. Mr Norris then spoke to Mr Folly and, amongst other things, asked for the meeting that afternoon to be postponed. Mr Folly passed that request on to Mr Harvey who telephoned Mr Norris. In that conversation, Mr Harvey told Mr Norris, in no uncertain terms, that he thought there was no role for Mr Norris in the discussions that he wanted to have with Ms Duncan and that the meeting would not be postponed.

[21] Against that background, the meeting proceeded at 3.30 pm that day, Monday, 15 October 2007. Present at the meeting were Mr Harvey, Mr Folly, Ms Duncan and Ms McGrath, who was the senior accounts person with the business.

Mr Harvey effectively gave Ms Duncan an ultimatum. He told her that if she did not accept the position as described in the letter of 11 October, her employment would be terminated on grounds of redundancy. It was clear from the evidence as a whole that this was the first time Ms Duncan had been told that her employment was at risk.

[22] Ms Ironside invited me to infer from the evidence that, as Ms Duncan's work was reducing, she must have known for some time that her employment was at risk. I reject that proposition. It would be totally appropriate to draw such an inference in light of the evidence that Mr Harvey had been repeatedly telling staff over the previous 4 months that no one's employment was at risk.

[23] Returning to what occurred at the meeting, Mr Harvey put this stark alternative to Ms Duncan three times. Each time, she said she did not want to accept the position described. Mr Harvey then gave Ms Duncan 4 weeks' notice of dismissal on the grounds of redundancy. There followed a discussion about when Ms Duncan would finish. Mr Harvey offered her the option of finishing immediately with payment in lieu of notice. Ms Duncan took that option. It was then agreed that the payment in lieu of notice would be paid over the succeeding 4 weeks.

[24] There was evidence that, at the very end of this meeting, Mr Harvey made an offer to have a subsequent meeting with Ms Duncan and Mr Norris. Ms Duncan denied that this happened, and in light of the attitude Mr Harvey had displayed to Mr Norris on the telephone earlier that afternoon, it seems unlikely. Again, however, I need not resolve this issue as it is common ground that, by this time, Ms Duncan had already been dismissed and the employment relationship was at an end. Any further meeting could therefore have been of very little, if any, significance.

[25] Ms Duncan was duly paid a further 4 weeks' wages. Sometime after that, she obtained part time bar work. It is unclear exactly when she commenced that work and the exact hours she worked. She said in her evidence that she began 1 or 2 months after 15 October and that she worked 15 to 20 hours per week. Other than

that, she had no work or income until she obtained a full time position in March 2008.

[26] There was evidence of events which occurred after Ms Duncan's dismissal which were relied on in relation to remedies. The first of these issues related to attempts by Mr Harvey to telephone Ms Duncan. In a letter from Mr Norris to Mr Harvey dated 19 October 2007, Mr Norris had asked on Ms Duncan's behalf that all further communication with her should be through him. Mr Harvey attempted to call Ms Duncan after that. She recognised his number on her cell phone and, when the calls were received, she did not answer them but said that she did nonetheless find it distressing that Mr Harvey was attempting to call her when she had asked that he not do so. As a result, she had Mr Norris write to Mr Harvey again, repeating the request. It appears there were yet further attempts by Mr Harvey to call Ms Duncan and a third letter had to be written by Mr Norris asking him to desist.

[27] The second issue is what Mr Harvey told other potential employers about Ms Duncan when they contacted him. Ms Duncan said that Mr Harvey spoke negatively about her to several employers but only gave details in relation to one. The essence of this evidence was that, while Mr Harvey had said Ms Duncan was a good worker, he criticised her for pursuing a personal grievance.

[28] The third issue related to an allegation by Mr Harvey in a letter to Mr Norris dated 12 November 2007. This letter was in response to the initial correspondence from Mr Norris raising the personal grievance. Towards the end of the letter, Mr Harvey said there was evidence of misuse of the internet and of email including what appeared to be downloading information from pornography sites. Mr Harvey suggested that this had been done by Ms Duncan and said, *"This may go some way to explain why Leanne may have chosen to turn down a position that did not give her the same access to a computer as before."* From the evidence I heard it could not be concluded that Ms Duncan was responsible for anything that may have been done in relation to the internet and, to his credit, Mr Harvey expressed his regret at having made such a suggestion.

[29] The other aspect of the evidence I should record is that, on 17 October 2007, that is 2 days after Ms Duncan was dismissed, an advertisement was placed in the local newspaper offering a position as a receptionist for the plaintiff.

[30] Ms Duncan's claim is that she was unjustifiably dismissed. There is no question that she was dismissed. Whether that dismissal was justifiable must be determined in accordance with s103A of the Employment Relations Act 2000 ("the Act"):

> ***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.*

[31] Ms Ironside submitted that I should apply s103A in two parts; firstly, to determine whether the dismissal was substantively justifiable and, secondly, to decide whether an appropriate procedure had been followed. While that is, on occasions, a convenient method of analysis, at the end of the day the issue of justification must be determined as a whole.

[32] As to the substantive justification, Ms Ironside submitted that this was a genuine redundancy. I accept that proposition in the sense that the employer's actions were genuine because they were not for an ulterior purpose. I also accept that both Mr Harvey and Mr Folly genuinely wished to retain Ms Duncan in the plaintiff's employ.

[33] In the broader sense of the term, however, I have some difficulty with the proposition that this was a genuine redundancy. It is common ground that the volume of Ms Duncan's quote work had diminished substantially by October 2007 but it was then still occupying 40 percent or so of her time. Ms Duncan was also still carrying out a range of other duties. Another factor is that the CCM software required a good deal more information to be inputted than had the previous Nimbus software. Thus, although Ms Duncan was only handling the quotes for one-third of the sales staff she had previously supported, that quote work was taking more than

one-third of her time. Mr Harvey suggested in his evidence that Ms Duncan had time on her hands as at 15 October 2007 but I prefer Ms Duncan's evidence that at that time she was still fully occupied.

[34] In the circumstances, there is no question that Ms Duncan's role had diminished but it is equally clear that it had not disappeared. Far from it. This was therefore not a situation where Ms Duncan could have been dismissed for redundancy and all of her remaining duties absorbed by other existing staff. That was graphically demonstrated by the fact that, immediately following her dismissal, an advertisement was placed to employ another staff member. This was an ongoing situation because, when that new staff member left after 3 weeks, she was replaced. Rather than this being a redundancy in the sense of Ms Duncan's role being entirely superfluous, this was a situation where there was sufficient work for all staff and the employer wanted to rearrange how that work was done. In that sense, this was a restructuring rather than a redundancy.

[35] Regardless of how the situation is characterised, however, there needed to be proper consultation with Ms Duncan before any decisions were taken which would affect her employment.

[36] Ms Ironside submitted that the events over the period June to October 2007 amounted to consultation about the changes eventually set out in the letter of 11 October 2007. I do not accept that submission. To be effective consultation requires, firstly, the provision of sufficient information to fully appreciate the proposal being made and the consequences of it and, secondly, an opportunity to consider that information and, thirdly, a real opportunity to have input into the process before a final decision is made.

[37] In this case, it is clear to me on the evidence that Ms Duncan was not told fully and clearly what her employer wanted until she was given the letter of 11 October 2007. By that stage, what she was given was not a proposal. It was a final position. This became abundantly clear on 15 October 2007. Even the letter of 11 October 2007 failed in a critical respect to properly inform Ms Duncan because it

did not say that the only alternative to accepting the position described was dismissal.

[38] That omission was a fundamental breach of the plaintiff's obligations under s4(1A)(c) of the Act. This was compounded by Mr Harvey's decision on 15 October 2007 not to allow Ms Duncan to be represented at the meeting he wanted to have with her, refusing to postpone it and then proceeding to give Ms Duncan an ultimatum and to dismiss her without representation when he knew that she wished to be represented.

[39] Putting this into the context of s103A, all of these actions were not what a fair and reasonable employer would do in all the circumstances. In the course of her submissions, Ms Ironside accepted that the manner in which Mr Harvey handled the matter was less than satisfactory but submitted that these were but minor procedural irregularities. I disagree. In my view, these were major departures from the standard of fair and reasonable conduct required of employers when dealing with their employees. Overall, I find that the decision to dismiss Ms Duncan was unjustifiable.

[40] In some cases it can be confidently said that, if the matter had been handled appropriately, the outcome would have been the same. Such a proposition is often advanced in cases involving redundancy. Ms Ironside relied on this proposition, and the decision of the Court of Appeal in *Aoraki Corporation Ltd v McGavin* [1998] 1 ERNZ 601, to suggest that, even if the dismissal was unjustifiable, Ms Duncan ought not to be awarded remedies for loss of her job. In my view this is not such a case. Ms Duncan's position was not entirely gone. Far from it. Had there been proper consultation with an opportunity for representation by Mr Norris, there may well have been a different outcome. In particular, the parties may have negotiated changes to Ms Duncan's duties acceptable to her and to Mr Harvey. I find therefore that Ms Duncan is entitled to the full range of statutory remedies for unjustified dismissal.

[41] Turning firstly to the remedy of lost remuneration, the evidence, as I have said, was that Ms Duncan was paid in full for the first 4 weeks and that subsequently she did part time work. On Ms Duncan's behalf, Mr Norris did not suggest that she

should be awarded reimbursement of lost remuneration for more than the primary statutory period of 3 months. I agree with that assessment as it seems to me there is no evidence justifying an extension. Taking 3 months as 13 weeks, this means Ms Duncan lost remuneration for 9 weeks. At the time she was dismissed, she was paid $620 per week. Taking a point midway in the range of times that she gave me for her part time work, I regard her as having done that work for 6 of those9 weeks at the rate of $225 per week. On that basis, I find that the remuneration she lost during the 3-month period was $4,230 gross. There will be an order that the plaintiff pay her that sum.

[42] As to compensation for humiliation, loss of dignity and injury to the feelings, there was limited evidence. What Ms Duncan said was that she was greatly distressed by the dismissal and the circumstances in which it occurred. She also gave evidence of distress as a result of Mr Harvey's attempts to telephone her contrary to her wishes. There was no evidence, however, of distress as a result of other aspects of the matter and it is not proper for me to infer it. I regard the sum awarded by the Authority in this regard as appropriate and I therefore confirm that the plaintiff is to pay Ms Duncan $5,000 by way of compensation.

[43] In relation to remedies generally, Ms Ironside submitted that Ms Duncan had contributed to the situation giving rise to her personal grievance and that her remedies ought to be reduced accordingly. The only evidence she relied on for this submission was the coarse language used by Ms Duncan to Mr Harvey on 9 October 2007 and to Mr Folly on 15 October 2007. Whilst the use of that language may have been inappropriate, I do not find that it contributed to the situation in any way at all. I therefore find that there is no basis on which to reduce the remedies awarded.

[44] Pursuant to s183 of the Act, the Authority's determination is set aside and this decision now stands in its place. The Authority's costs determination is not disturbed.

[45] I reserve the question of costs. Compared to the Authority's determination, Ms Duncan has obtained somewhat less by way of remedies but in terms of the

substantive issue, the plaintiff has been unsuccessful. In my view, Ms Duncan is entitled to a reasonable contribution to the costs she has incurred in very largely resisting the plaintiff's challenge.

[46] I invite Ms Ironside and Mr Norris to confer about the quantum of costs with a view to agreement. If they are unable to agree, Mr Norris should file and serve a memorandum within 28 days after today. Ms Ironside will then have a further 14 days in which to file and serve a memorandum in response.

A A Couch
Judge

Oral judgment delivered at 3.30 pm on 20 November 2009