IN THE EMPLOYMENT COURT
AUCKLAND

[2015] NZEmpC 39
ARC 61/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	YASODHARA DA SILVEIRA SCARBOROUGH Plaintiff
AND	MICRON SECURITY PRODUCTS LIMITED Defendant

Hearing: 16 February 2015

Appearances: Y Scarborough, in person
D France and S Worthy, counsel for defendant

Judgment: 30 March 2015

JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] Miss Scarborough's employment with Micron Security Products Ltd (Micron) was terminated three months after she commenced work there. The company claimed that the termination arose against the backdrop of a fall-off in business and that the decision was made for genuine business reasons. However, it has accepted from the outset that it failed to follow the correct procedure. The Employment Relations Authority (the Authority) agreed, concluding that the company had failed to provide relevant information to Miss Scarborough prior to terminating her employment. She was awarded the sum of $750 in compensation for hurt and humiliation.[1]

[1] *Scarborough v Micron Security Products Ltd* [2014] NZERA Auckland 231.

[2] Miss Scarborough elected to challenge the Authority's determination. Her challenge was pursued on a de novo basis.

Background

[3] Miss Scarborough has appeared in person throughout the proceedings, as is her right.[2]

[4] A number of interlocutory matters have been pursued, two of which involved an application for orders referring the proceeding back to the Authority. The Chief Judge dealt with the first tranche of applications, and declined the application to refer the proceeding back to the Authority for investigation, for reasons set out in a judgment dated 25 September 2014.[3] The Chief Judge directed that the challenge be progressed by way of hearing management under the Employment Court Regulations 2000.

[5] Timetabling orders were made, including for the exchange of briefs of evidence. The defendant complied with those orders. Miss Scarborough did not. A hearing management conference was convened before Judge Perkins. Issues relating to the scope of the hearing were traversed at the conference. A second application advanced by Miss Scarborough for the proceeding to be referred back to the Authority was dismissed. In doing so Judge Perkins observed that:[4]

> It is difficult to ascertain what Ms Scarborough is now seeking from her further application, although in the application itself there appears to be a repetition or redirection of her earlier application attempting to bring the matter within the judicial review jurisdiction of the Court. The true intention of the application is perhaps ascertained in the final paragraphs of her supporting affidavit where it seems plain that once again she is applying to have the matter transferred back to the Authority. Chief Judge Colgan has already dealt with and rejected such an application. If the further application is once again seeking judicial review of the Authority, then it overlooks the extremely limited nature of the Court's jurisdiction to judicially review the Authority.
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> …

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2 Employment Relations Act 2000, sch 3, cl 2(1)(a).
3 *Scarborough v Micron Security Products Ltd* [2014] NZEmpC 183.
4 *Scarborough v Micron Security Products Ltd* [2014] NZEmpC 216 at [8], [13].

> What appears to be the real purpose of Ms Scarborough's application is to simply attempt to relitigate issues that were raised in her earlier applications and which have been dealt with by Chief Judge Colgan in his judgment…Chief Judge Colgan in his judgment has already dealt with Mrs Scarborough's application to have the matter referred back to the Authority in this context. There is no entitlement to revisit these findings even though that appears to be the purpose of Mrs Scarborough's further application. It is dismissed.

[6] Judge Perkins repeated earlier observations by the Chief Judge that Miss Scarborough was choosing to represent herself in circumstances where she should be receiving the benefit of proper legal advice. He went on to note that if she chose to continue representing herself in the preparation of briefs of evidence she was to avoid repeating the "insulting and scurrilous comments she has made against parties involved in this matter, counsel for the defendant and the Authority member." Judge Perkins also drew Miss Scarborough's attention to the fact that the timeframe for filing any additional interlocutory applications had expired.

[7] Prior to hearing Miss Scarborough filed a document entitled "Brief of Evidence". In a minute issued on 9 February 2015 I noted that, while carrying this description, it appeared to be a further application to have the matter referred back to the Authority for investigation and/or an application for an adjournment. I directed that if Miss Scarborough was now wishing to file a brief of evidence she would need to seek leave to do so (given that the timeframe for filing had passed), and that she should append a draft brief of evidence to any such application. I recorded that if Miss Scarborough was advancing an application to have the proceeding referred back to the Authority there may be difficulties with it, but that argument would be heard on the issue at the beginning of the hearing. I made it clear that both parties must come to Court prepared to deal with the substantive challenge, in the event that any application for an adjournment and/or referral to the Authority did not succeed.

[8] The plaintiff filed a document entitled "Application Regarding Matters of Law" on 10 February. The document set out the reasons why Miss Scarborough considered that the Court should refer the matter back to the Authority; advised that she had requested an investigation into her dismissal by the Ministry of Social Development; contended that the Authority member had not carried out a thorough investigation and did not have material evidence to support her determination; and

that counsel had no standing to appear and were in breach of s 21 of the Lawyers and Conveyancers Act 2006. Particular reliance was placed on s 187(1)(a) of the Employment Relations Act 2000 (the Act).

[9] At the outset of the hearing Miss Scarborough confirmed that she wished to advance an application for the entire matter to be referred back to the Authority. That application was opposed by the defendant. I dismissed the application, indicating that the reasons for doing so would follow. The application was essentially a repetition of the earlier applications advanced by Miss Scarborough. While Miss Scarborough made it clear that she did not agree with the conclusions reached by the Chief Judge and Judge Perkins that does not provide a basis for seeking to re-litigate matters. The fact that the application had effectively been previously dealt with was enough to dispose of it.[5] Even if it had not been it could not have succeeded.

[10] As I have said, the application was primarily based on s 187(1)(a) of the Act. That provision states that the Court has exclusive jurisdiction to hear and determine elections made under s 179 for a hearing of a matter previously determined by the Authority. As I understood the nub of the plaintiff's argument, the Authority had failed to deal with a number of issues which Miss Scarborough considered it ought to have dealt with and the Court did not have the jurisdiction to hear the challenge until all of these matters had been fully investigated and determined by the Authority.

[11] The Authority issued a determination finding that the plaintiff's dismissal was unjustified. The plaintiff was dissatisfied with that determination and exercised her right to file a challenge to the determination under s 179(1). The effect of a challenge under s 179 is that the whole employment relationship problem is before the Court for adjudication. The Court is required to make its own decision on the matter and any relevant issues, under s 183(1). There is no power to return a matter to the Authority instead of dealing with the challenge. Nor is there any power to direct the Authority on the exercise of its investigative role.[6] It followed that the application could not succeed.

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5 High Court Rules r 7.52.

6 See Employment Relations Act 2000, s 188(4).

[12] Miss Scarborough also contended that Mr France and Mr Worthy had breached their obligations as counsel, were not qualified lawyers and accordingly had no right to appear in Court on behalf of the defendant. Miss Scarborough had earlier raised issues about Mr France's capacity to appear before Judge Perkins, and they had been dismissed. The Judge had warned her about the need to avoid advancing scurrilous comments. Miss Scarborough remained undeterred. There is nothing before the Court to support the contention that either Mr France or Mr Worthy have breached any of their obligations as counsel, and (in any event) the Court has no jurisdiction to determine that issue.[7] In relation to the suggestion that they are not qualified lawyers, counsel had already helpfully referred Miss Scarborough to the Registry of Lawyers on the Law Society website. Even if Mr France and Mr Worthy had not been qualified lawyers it would make no difference, as a party may be represented by an agent at hearings in this Court.[8]

[13] The plaintiff's application was misconceived and was dismissed. As Mr France observed, if Miss Scarborough did not wish to proceed with her challenge she had the option of withdrawing it. Although initially indicating that she may be minded to take up this option, I stood the matter down for Miss Scarborough to reflect on what she wished to do. She subsequently confirmed that she intended to continue with her challenge but sought an adjournment, primarily on the basis that the Ministry of Social Development had been invited to investigate the circumstances surrounding her employment with Micron and it was appropriate to wait for the outcome of any inquiry. I did not accept this. The application was declined.

[14] Miss Scarborough then confirmed that she was not intending to offer any evidence in support of her challenge. This was consistent with an earlier indication she had given during the course of the hearing management meeting before Judge Perkins. The risks associated with such a course had been highlighted in his minute dated 17 December 2014, where it was recorded that:

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7 Nor does the Court have any supervisory jurisdiction over barristers and solicitors per *Hurst v Eagle Equipment Ltd* [2011] NZEmpC 110 at [18], as Mr France observed.

8 Above, fn 2.

> Ms Scarborough, in breach of Judge Inglis' directions has not filed briefs of evidence or draft briefs of evidence with her management memorandum.
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> The defendant has complied and has filed briefs or draft briefs of the two witnesses it intends to call. The defendant has also filed a draft bundle of documents. Ms Scarborough has not.
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> It can only be presumed that Ms Scarborough does not intend to give evidence herself or call witnesses at the hearing. In her management memorandum she persists in raising issues, which have now been dealt with in two interlocutory judgments of this Court.
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> …
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> Without evidence it is difficult to see how Ms Scarborough can proceed with her challenge, which is to be heard by way of a de novo hearing as she has requested. It may well be that she simply intends to rely upon submissions.

[15] The potential pitfalls of failing to offer any evidence were again explained at the outset of the hearing. Miss Scarborough nevertheless wished to proceed on this basis, as she was entitled to do.

The facts

[16] The defendant's witnesses gave evidence. As I have said, Miss Scarborough elected not to offer any evidence in support of her challenge. Nor did she wish to take up the opportunity to cross-examine the defendant's witnesses. The challenge must be determined on the uncontested evidence before the Court. I proceed on that basis.

[17] The company designs and manufactures alarm, access control, medical emergency response and alarm accessory products for both the New Zealand market and a number of export markets. It is a relatively small company, which is sensitive to fluctuations in demand for its products. From around the middle of 2013 the company's managing director, Mr Weston, gave consideration to the possibility of employing an additional person on the assembly line. This was based on an assessment made at the time that there would be an increase in demand.

[18] Mr Weston had been in contact with the local Work and Income New Zealand (WINZ) office, and the suggestion was made that Miss Scarborough (who was at that

time unemployed and looking for work) could be employed under a placement programme. The programme involved a wage subsidy for around three months.

[19] Miss Scarborough was offered and accepted employment as an assembler. Mr Weston signed the employment agreement on behalf of the company. Miss Scarborough commenced employment on 16 September 2013. It is apparent that she was well regarded in terms of her technical skills.

[20] Although Miss Scarborough had only been with the company for a short period of time, she began to raise a number of issues with management about ways in which she perceived the business might be improved. Mr Weston considered that a number of her proposals were impractical and reflected a lack of knowledge of the business environment. Miss Scarborough also raised a number of concerns about Mr Palwankar, the production supervisor. On 15 November 2013 she emailed Mr Weston advising that she believed that Mr Palwankar was sabotaging the business. Mr Weston spoke to Mr Palwankar about the concerns that Miss Scarborough had raised but concluded, after hearing from him, that no further inquiry was warranted.

[21] Independently of Miss Scarborough's unusual behaviour, Mr Weston was becoming increasingly concerned that the upswing in demand that he had anticipated just prior to Miss Scarborough's appointment was not materialising. His concerns were reinforced by Mr Palwankar's assessment of the situation. Mr Palwankar had been with the company for approximately 23 years and both he and Mr Weston had a very good understanding of the company's operations. Mr Weston and Mr Palwanker discussed how matters might best be addressed and decided that consideration should be given to reducing staff numbers. Because Miss Scarborough had been recently employed, and others in the company had been employed for very lengthy periods of time (namely seven or more years), the proposal was that Miss Scarborough's position be disestablished.

[22] Mr Weston met with Miss Scarborough on 16 December 2013 and advised her that the company did not have sufficient work for her and that her position was to be made redundant. She was given one week's notice. Written notice of this decision followed. In that letter Mr Weston confirmed that the decision was being

made because of continued weak demand for the company's products. He took the opportunity to thank Miss Scarborough for her commitment to the company during her short time with it and confirmed that he would be more than happy to provide a reference for her.

[23] I accept Mr Weston's evidence that Miss Scarborough did not express any surprise at the decision to terminate her employment on the grounds of redundancy and that she was accepting of the situation. Indeed she acknowledged that she had been anticipating such a step given the downturn in production. His evidence in this regard is supported by subsequent correspondence. It is apparent that she departed the company on good terms, following the office Christmas lunch.

[24] Miss Scarborough wrote to Mr Weston reiterating her concern that the production line was being sabotaged. The letter set out some ways in which Miss Scarborough perceived the business might operate more efficiently, concluding that she would very much like to continue working with Micron. The letter records an acknowledgment by Miss Scarborough that she had been appointed against the backdrop of anticipated growth and that she was aware, as at 15 December, that the company was in difficulty in terms of production demand. Mr Weston gave evidence (which I accept) that he did not read the letter until after the decision to terminate Miss Scarborough's employment had been made.

[25] Following her departure from the company, Miss Scarborough began compiling reports in relation to Micron's business activities. These reports detailed the ways in which Miss Scarborough believed the company's fortunes could be turned around. The reports were unsolicited. She emailed them through to Mr Weston on 24 December, 29 December and 3 January 2014. During the course of this correspondence Miss Scarborough recorded her thanks to Mr Weston "for everything".

[26] On Saturday 25 January 2014 Miss Scarborough wrote to Mr Weston advising that she considered that she had been unjustifiably dismissed. She made reference to the concerns that she had raised in relation to Mr Palwankar and made a number of oblique references to inappropriate motivations Mr Weston might have

towards her. Miss Scarborough said that she would like to return to work "next week".

[27] Miss Scarborough sent a revised letter to Mr Weston on Monday 27 January. She advised that she was disappointed with her case manager at WINZ, who was said to have known that her dismissal was unfair but had failed to mention anything to her.

[28] Mr Weston replied on Monday 28 January reiterating that a weak demand for the company's goods had led to the termination of her employment, and advised that:

> The ending of your employment had nothing whatsoever to do with your job performance simply that we no longer had the factory work to justify your position.
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> …
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> As far as the other assertions you have made in this most recent letter and your previous emails to me and other micron staff, all I can say is that they are completely incorrect and have no substance whatsoever.

[29] A number of emails followed. Miss Scarborough made it clear that she did not accept that her dismissal was justified. On 29 January 2014 she wrote to Mr Weston in the following terms:

> Re: My Return to work on Monday 3rd February
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> May I come to see you either on Thursday or Friday in order for us to discuss my going back to work on Monday, please?
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> …
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> We have to overcome the problem, whatever it is, and move on. The business is picking up now; I wish you let me go back. Let us start all over again. Give me a time when I can come to see you.

[30] Mr Weston responded that the company was not in a position to appoint additional staff for the reasons he had already traversed. He did however subsequently agree to meet with her. That meeting occurred on 3 February 2014. The notes of the meeting record that five broad concerns were raised by Miss Scarborough and responded to by Mr Weston.

[31] First, Miss Scarborough raised a concern about the genuineness of the reasons given for her dismissal. She said that she had been discriminated against because she had raised concerns about the company being sabotaged. Mr Weston emphasised the operational reasons for the decision and explained why he did not consider that Mr Palwankar had been sabotaging the company.

[32] Second, Miss Scarborough raised a concern about sexual harassment. She was asked what the basis of the concern was. The notes record that her explanation was:

> Mrs Scarborough: Said [Mr Weston] had once commented on her hair and the way he looked at her and he had once given her a pair of shoes for her daughter that [Mr Weston's] daughter did not want…
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> Mr Weston: Said he didn't remember commenting on her hair but if he did it certainly wasn't any kind of harassment. Re the shoes he said he gave them to her for her daughter as an act of kindness nothing more.

[33] Third, Miss Scarborough was asked for detail about her health and safety concerns. The notes of meeting record the following response:

> Mrs Scarborough: Said that there was some dust in an area behind them and the noise level when the machine was on was too loud and they should have had ear muffs.
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> Mr Weston: Said the decibel level when the machine was on was well within the legal requirement and said if she had raised her concern with him he could have arranged ear muffs.

[34] Fourth, Miss Scarborough raised a concern about an alleged breach of privacy. This was said to relate to her written concerns about Mr Palwankar. Mr Weston responded that he had needed to ask Mr Palwankar questions about the issues she had raised.

[35] Finally, Miss Scarborough said that she had been concerned about a lack of communication between staff and management. Mr Weston rejected this comment and said that staff were free to raise anything with him, and that he was always walking around and talking to them.

[36] The meeting concluded on the basis that Miss Scarborough's concerns remained unresolved. Mr Weston subsequently advised that any further communication should be directed through the company's lawyer.

Analysis

[37] Section 103A(2) of the Act provides that the test for justification is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. The Court of Appeal has recently confirmed that the Court is entitled to enquire into the merits of the redundancy business decision.[9] The genuineness of the redundancy remains a key focus. Once that is established, if an employer concludes that the employee is surplus to its needs, the Court is not to substitute its business judgment for that of the employer.[10]

[38] Mr Weston believed at the time Miss Scarborough was appointed that there would be an increased demand for the company's products. This was based on a number of factors, including a projected improvement in the economy and an associated increase in demand for the company's products. The anticipated increase, which had led to Miss Scarborough's appointment, did not eventuate. Rather there was a downturn in demand. Mr Weston spoke to Mr Palwankar about the situation and he confirmed that the factory would be over-resourced from the start of 2014. It is noteworthy that, at the relevant time, Miss Scarborough herself had identified a decline in production. While it is apparent that she has consistently attributed that to industrial sabotage, it is clear on the evidence before the Court that the decline in production was directly linked to a lack of demand.

[39] The company's financial records support the position advanced on behalf of the defendant. It is further reinforced by the fact that no additional employees have been appointed following Miss Scarborough's departure from the company.

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9 *Grace Team Accounting Ltd v Brake* [2014] NZCA 541 at [84]. The enquiry is directed at ensuring that the decision, and how it was reached, was what a fair and reasonable employer could have done in the relevant circumstances.

10 At [89]. See also *G N Hale and Son Ltd v Wellington Caretakers etc IUOW* [1991] 1 NZLR 151 (CA), [1990] 2 NZILR 1079 (CA) at 1085-1086.

[40] I am satisfied, based on the evidence before the Court, that there were genuine reasons for the restructuring that occurred. While it is true that the termination of Miss Scarborough's employment coincided with concerns she had raised, I accept Mr Weston's unchallenged evidence that Miss Scarborough's complaints played no part in the decision to terminate her employment. I also accept Mr Weston's evidence that she was selected for redundancy because she was the most recently hired assembler. Others had been employed by the company for a considerable period of time. Mr Weston understandably felt a strong moral obligation to safeguard the financial viability of the company and to protect long-standing staff members. The Authority found that the decision to select Miss Scarborough's position for redundancy was reasonable in the circumstances. I agree.

[41] Although there were genuine reasons for the termination of Miss Scarborough's employment, the procedure that was followed was flawed, even having regard to the fact that the company is a small scale business.[11] It failed to actively engage with Miss Scarborough. The failing cannot be described as minor[12] and Miss Scarborough was disadvantaged as a result. Mr France conceded that the procedural failing undermined the justification for the dismissal. However, I agree with his submission that even if the procedural requirements had been followed, the result would have been exactly the same.

[42] I do not accept, based on the evidence before the Court, that Miss Scarborough is entitled to any compensation for hurt and humiliation. During the course of the meeting with Mr Weston on 16 December 2013 she indicated that she understood why the company was making her position redundant. There is nothing else before the Court to support a claim for compensation under s 123(1)(c)(i) of the Act. A plaintiff who seeks relief must lay an evidential foundation for an award in their favour. Simply establishing the basis for a personal grievance does not suffice.[13]

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11 Employment Relations Act 2000, s 103A(3)(a).
12 Section 103A(5).
13 *Department of Survey & Land Information v NZ Public Service Assn* [1992] 1 ERNZ 851 (CA) at 857, 861.

[43] There is no evidence before the Court to support the claim for reinstatement.[14] That is sufficient to deal with this aspect of the claim. Even if it was not, it is clear that reinstatement is neither practical nor reasonable.[15] As well as the substantive justification for the dismissal (and the fact that there is no work for her to perform) there were the very serious and unsubstantiated allegations that Miss Scarborough has levelled against both the managing director and production supervisor of the company. It is plain that any relationship of trust and confidence that previously existed has now been irrevocably destroyed.

[44] I note for completeness that no claim was advanced in the amended statement of claim for lost remuneration, although Miss Scarborough advised that she was seeking compensation for lost remuneration during the course of the hearing. Even accepting that a claim was properly advanced, I would not have made an order in Miss Scarborough's favour. Any award would be entirely speculative, given that Miss Scarborough chose not to give evidence. Nor is there any evidence before the Court that she took steps to mitigate her losses.

[45] The challenge is dismissed.

[46] Costs are reserved. If the parties are unable to agree costs the defendant may file and serve any application together with supporting material within 28 days of the date of this judgment. The plaintiff will then have 21 days to file and serve any response, together with any supporting material. Anything strictly in reply is to be filed within a further seven days.

Christina Inglis
Judge

Judgment signed at 12 noon on 30 March 2015

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14 *Angus v Ports of Auckland* [2011] NZEmpC 160 at [66].
15 Employment Relations Act 2000, s 125(2).