

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 415
3253239

BETWEEN SHARNA ANDREWS
Applicant

AND SHANORA LIMITED
Respondent

Member of Authority: David G Beck

Representatives: Applicant in person
Shane Hitchcock for the Respondent

Investigation Meeting: 5 July 2024 in Christchurch

Submissions Received: 5 July 2024 from the Applicant
5 July from the Respondent

Date of Determination: 11 July 2024

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] Sharna Andrews was employed by Shanora Ltd as a full-time dairy farm assistant at a Southland dairy farm from 8 August 2022 until she was made redundant on 30 June 2023.

[2] Ms Andrews claims that Shanora Ltd unjustifiably dismissed her by effecting a redundancy process in a manner that was neither fair nor reasonable or in accord with good faith principles. As remedies, Ms Andrews claimed compensation for distress, lost wages, and various penalties.

[3] By contrast, Shanora Ltd contend that a restructuring process was initiated for genuine business reasons.

The Authority's Investigation

[4] The investigation meeting took half a day and I heard evidence from Sharna Andrews and Shane Hitchcock a co-director of Shanora Ltd.

[5] I received submissions from both parties' and additional information during and following the investigation meeting. I have carefully considered the information provided and submissions. As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not set out a full record of every event or matter of dispute between the parties. This determination is confined to making findings of fact and law necessary to dispose of Ms Andrews' claims.

Issues

[6] The issues I must resolve are:

- i. Was Ms Andrews unjustifiably dismissed or was the employment relationship ended by reason of a genuine redundancy enacted in a procedurally and substantively fair manner, including questions of:
- ii. Whether there were genuine business reasons for the redundancy.
- iii. Did Shanora Ltd comply with the relevant provisions of Ms Andrews' individual employment agreement?
- iv. Did Shanora Ltd breach any good faith obligations?
- v. Is there any evidence that the restructuring was enacted for an ulterior motive or contrived?
- vi. Were unlawful deductions made from Ms Andrews' final pay?
- vii. If Ms Andrews' claims are established what remedies should be awarded including consideration of appropriate penalties for alleged statutory breaches.

- viii. An assessment of the level of costs to be awarded to the successful party.

What caused the employment relationship problem?

[7] Shanora Ltd initially engaged Ms Andrews pursuant to a Federated Farmers 2022/2023 produced individual employment agreement. The employment agreement purported to be for a fixed term position commencing on 8 August 2022 but was not compliant with s 66(4) of the Act and unable to be relied upon as no end date or reason was specified or event detailed, that would bring the employment to an end.¹ Shanora Ltd's actions in making Ms Andrews redundant also confirm they were not seeking to rely upon the employment as being for a fixed term.

[8] Shanora Ltd is a company that provides farm management services. Ms Andrews was engaged to work as a dairy assistant on a Southland client's farm. Ms Andrews reported to Mr Hitchcock and his partner Ora Hitchcock, co-directors of Shanora Ltd.

[9] The employment agreement indicated Ms Andrews' hours of work were a guaranteed 40 hours between 4am and 5pm for a salary of \$70,000 with a \$350 per week deduction of rent. This equated to an effective hourly rate of \$33.66 or \$1346.40 per week. Ms Andrews, however, says she sometimes worked over 60 hours per week at peak times but no wages and time record was kept. A clause in Ms Andrews' employment agreement provided the applicable minimum wage would be paid for all hours worked and a calculation suggests that Ms Andrews' was remunerated at or just below the minimum hourly wage rate for hours worked.

[10] Ms Andrews' initially travelled to the farm from Invercargill but then moved to a rental property five minutes commute away that Shanora Ltd leased off the farm client and was part of Ms Andrews' employment package.

¹ See section 66(6) Employment Relations Act 2000.

Proposed relocation

[11] On 21 December 2022, Mr Hitchcock texted Ms Andrews to advise that the farmer wished her to relocate to a property on the farm. Ms Andrews at the time was on leave and indicated she was unwell and would not return to work the next day but asked to view the proposed new rental property. Mr Hitchcock's response of 22 December was to first insist Mr Andrews provide a medical certificate despite the absence being only for one day. Later that day, Mr Hitchcock indicated he was unable to show Ms Andrews the proposed rental as he was taking time off for his Christmas break.

[12] In the interim, Ora Hitchcock had indicated to Ms Andrews on 27 December, that her new house on the farm was ready to move into and she had to arrange getting the power switched on and sort out her roster. Ms Andrews who was on leave at the time, indicated she would contact Mr Hitchcock when she returned on 3 January.

[13] On 2 January Ms Andrews texted Mr Hitchcock inquiring when she could view the house. In response by text Mr Hitchcock indicated:

Another worker has taken the house. Your landlords where you live now said you want to take on the house that you are in. that's fine with us but will need to have a meeting with you tomorrow at 6pm.

The 3 January meeting

[14] Ms Andrews says although not specified, she assumed the 3 January evening meeting at the Hitchcocks' residence was to discuss her housing situation. Ms Andrews attended with her partner and met Ora and Shane Hitchcock. Ms Andrews recalled being informed by Mr Hitchcock that the farmer felt with work becoming quieter they did not require her services and she was to finish up immediately and would be paid for the next two weeks to allow her to look for another job. Mr Hitchcock then provided a letter over his signature dated 3 January 2023 that indicated in summary:

- Ms Andrews had been "selected for redundancy due to the restructure of the business".
- There had been a discussion about changing her hours but none were suitable.

- The proposed housing move was traversed.
- They had determined Ms Andrews was “not eligible for the company redeployment scheme”.
- Ms Andrews “last day” would be 18 January and her notice period would be paid in lieu.
- Items of property and goods were specified that needed to be returned or paid for by Ms Andrews.
- A reference was offered on request.

[15] The letter prior to thanking Ms Andrews for her contribution to the business, stated: “You have the right to appeal this decision. If you would like to take this course of action, please confirm in writing to the email address above.”

[16] Ms Andrews recalled the meeting being brief with little discussion.

[17] In contrast, Mr Hitchcock’s evidence was he got legal advice from Federated Farmers about the process he should use and while Mr Hitchcock acknowledged that he had little cause to question Ms Andrews’ performance in the role and says he was encouraging in his management of her, he says he was under pressure from the farm owner who had been clawing back money from him due to a previous incident were Ms Andrews had supposedly wrongly mowed some pasture and, he was under some pressure to move workers onto farm accommodation. Mr Hitchcock also indicated a farm advisor had told him to restructure his staffing.

[18] At around the same time of the ending of Ms Andrews’ employment, another farm worker had left after some performance issues. Mr Hitchcock when asked about consultation with Ms Andrews over the 3 January letter, suggested the offer for Ms Andrews to appeal his decision was an offer of further consultation that she did not take up. I observe the wording of the letter objectively, failed to even imply this premise.

The aftermath

[19] In Ms Andrews final pay, without consultation, deductions were made for an alleged overpayment of \$719.24 and she was paid up until 15 January rather than 18 January – the result of this was a zero balance in the final pay statement.

[20] Mr Hitchcock to his credit, acknowledged during the investigation meeting that this was a mistake and that his partner had handled the final pay utilising an external payroll agent. He agreed to rectify the error by reversing the deduction and paying Ms Andrews an additional three days' pay, up to 18 January (at the time of issuing this determination the Authority had no indication of this payment being met).

[21] Around a week after Ms Andrews was made redundant, Shanora Limited advertised on the Southland Dairy Farm Jobs Facebook page seeking a "farm assistant herd manager". Mr Hitchcock did not contest this fact or provide an explanation.

Personal grievance

[22] Utilising an advocate, by letter of 25 January 2023, Ms Andrews suggested she had been unjustifiably dismissed and that Shanora Ltd had made unlawful deductions from her final pay.

[23] Upon receiving no response to the personal grievance letter and attempts to set up mediation failing, Ms Andrews' advocate filed a statement of problem with the Authority on 17 September 2023. The statement was served on Shanora Ltd on the same day.

[24] Mr Hitchcock responded by return email indicating Shanora Ltd "has gone bankrupt and ceased trading so I am not sure what this is about" and he provided a contact telephone number. The Authority officer responded by noting Shanora Ltd was still a registered company and that Ms Andrews was entitled to pursue the matter. Ms Andrews' advocate also objected to Shanora Ltd's removal from the companies register and this objection was accepted by the Companies Registrar on 29 September 2023.

[25] From this point in time up to the investigation meeting, Shanora Ltd remained largely incommunicado – no statement in reply was filed and despite Mr Hitchcock attending a case management conference in October 2023, no briefs of timetabled evidence were provided by him. Shanora Ltd was directed by the Authority to disclose Ms Andrews wage time and holidays records but failed to do so.

[26] Mr Hitchcock in attending the investigation meeting by an audio-visual link, indicated he was residing in Indonesia and his business affairs were in a mess due to an injury Ora Hitchcock had suffered that required long term care. Mr Hitchcock claimed Shanora Ltd was not trading, in the process of a legal dispute with their accountant and unable to pay creditors but no documentary evidence validating any of this was provided.

The Employment Agreement

[27] Ms Andrews' employment agreement at clause 22.1 under a heading "Redundancy" briefly indicated:

In this clause 'redundancy' means a situation where your employment is liable to be terminated, because your position is, or will become, no longer required. We must have a genuine work-related reason for redundancy. A redundancy must be about the position, not you personally.

[28] Further at clause 22.23, the employment agreement notes "If we wish to take action under this redundancy clause, we will follow a fair process." The provision then lists thirteen factors that are required to be followed. I summarise such as being consistent with case law and good faith requirements including the requirement to engage in prior consultation over a proposal that must be set out in writing then a process of engagement to seek feedback and finally consideration of alternatives to redundancy.

Justification

[29] To justify termination of employment or an employer's actions, including in a redundancy situation, Shanora ltd must also meet statutory requirements set out in s 103A of the Act commonly referred to as the 'justification test'. In *Stormont* in the context of a redundancy case the court indicated:

In order for a redundancy to be justified, an employer must demonstrate that the dismissal was what a fair and reasonable employer could have done in all of the circumstances at the time the dismissal occurred. The Court must consider whether the employer met the minimum standards of procedural fairness outlined in s 103A of the Act and whether it made a decision to terminate the employment relationship on substantively justified grounds.²

² [2017] ERNZ 352 at [52].

Good faith

[30] To ensure a redundancy is enacted in a procedurally fair manner, good faith obligations also apply as set out in s 4 of the Act - these include a positive disclosure obligation enabling employee access to all relevant information supporting the reason for the redundancy and detail of how it will be implemented. Further and crucially, a fully informed employee must be afforded an opportunity to comment on any redundancy proposal prior to a decision being finalised and once the decision has been made, redeployment options should be explored.

[31] The Court of Appeal in *Grace Team Accounting v Brake*³, has ruled that an employer claiming to be in a redundancy situation is only entitled to justifiably end an employment relationship for valid and demonstrable commercial reasons and when looking at applying s 103A, O'Regan J said:

If the decision to make an employee redundant is shown not to be genuine (where genuine means the decision is based on business requirements and not used as a pretext for dismissing a disliked employee), it is hard to see how it could be found to be what a fair and reasonable employer would or could do. The converse does not necessarily apply. But, if an employer can show the redundancy is genuine and that the notice and consultation requirements of s.4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s.103A test.⁴

[32] The above requires the Authority to determine first if the redundancy was genuine (an assessment that must exclude any ulterior motive) and then determine whether it was enacted in a procedurally fair manner.

Ulterior motive?

[33] I will first deal with what emerged from the evidence on whether the decision Shanora Ltd reached had any firm business reasoning and assess whether in the alternative, Ms Andrews may have been personally targeted for perceived performance issues that were incidentally not put to her. In effect, the premise put by the grievance is that the position was

³ *Grace Team Accounting Ltd v Brake* [2015] 2NZLR 494 (CA) at [85].

⁴ At [85].

not redundant to the employer's needs and the decision that was enacted with little or no regard to fair process, was enacted for an ulterior motive.

Assessment

[34] Given the circumstances, including the advertising of a position soon after Ms Andrews left Shanora Ltd, no genuine redundancy situation existed and Ms Andrews was misled by the reasons given to her for her employment ending in what was a process that lacked her input.

Finding

[35] I find, despite Mr Hitchcock in evidence deferring the reasoning for the redundancy to other parties, that the redundancy was not genuine and Ms Andrews was unfairly targeted.

Procedural fairness and good faith factors

[36] Given the finding that an ulterior motive drove the decision to make Ms Andrews redundant I turn to assessing procedural fairness matters and whether any lack of adherence to such, impacted on Ms Andrews.

[37] This analysis is simple: other than having a meeting to communicate a pre-determined decision to end the employment 'in person,' there was a total lack of adherence by Shanora Ltd to procedural fairness and good faith factors. The relevant employment agreement provisions cited above, were simply ignored and no 'fair process' was engaged in.

Findings

[38] Overall, I have found in the circumstances, that Ms Andrews was unjustifiably dismissed in a procedurally and substantively unfair manner that breached the provisions of her individual employment agreement and is entitled to the consideration of statutory and other remedies.

What remedies should Ms Andrews be awarded?

Lost wages and arrears owed.

[39] Having found that Ms Andrews was unjustifiably dismissed and her employment did not end due to a genuine redundancy, consideration of the reimbursement of lost wages falls due under s 123(1)(b) of the Act.

[40] Ms Andrews evidence was she incurred a period of three weeks without wages before she found alternative employment. I calculate that to be \$4,086.

[41] In addition, Shanora Ltd's Mr Hitchcock conceded that the deductions made from Ms Andrews' final pay had no basis and should be reversed together with an additional three days pay owed as an imposed in lieu of notice payment. This amounts to \$719.24 as the reversal of the deduction made and \$807.60 for three days' pay. A total of \$1,526.84.

Compensation for humiliation, loss of dignity and injury to feelings

[42] I heard from Ms Andrews about the impact of the suddenness of the decision to end her employment the distress and disruption this caused and the feeling of humiliation at seeing her job advertised soon thereafter.

[43] In all the circumstances, I consider Ms Andrews level of distress due to the impact of the actions and omissions warrants a reasonable amount of compensation. I fix that amount at \$14,000 pursuant to section 123(1)(c)(i) of the Act.

Penalties

[44] In all the circumstances I decline to award any penalties.

Contribution

[45] Section 124 of the Act indicates that I must consider the extent to which, if at all, Ms Andrews' actions contributed to the situation that gave rise to her personal grievance and assess whether any calculated remedy should be reduced. In these circumstances, I can find no cogent reason to reduce the remedies awarded above.

[46] I find Ms Andrews was not engaged in any wrongful actions and she did not act in a blameworthy or culpable manner that gave rise to her grievances occurring, so no reduction in any of the remedies awarded is warranted.

Orders

[47] I find that:

- a. The circumstances of Sharna Andrews' employment ending, amounted to an unjustified dismissal and make the following orders.
- b. Shanora Limited must pay Sharna Andrews the sums below within 28 days of this determination being issued:
 - i. \$4,086 gross lost wages and \$1,526.84 arrears of wages pursuant to s 123(1)(b) of the Employment Relations Act 2000 ; and:
 - ii. A \$14,000 net compensation payment made pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

Costs

[48] As both parties were not represented costs are not at issue.

David G Beck
Member of the Employment Relations Authority