

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2021] NZERA 532
3050272

BETWEEN ALEXANDER CLARK
 Applicant

AND WOOFINGTONS LIMITED
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Tracy Campbell, advocate for the Applicant
 Kevin Smith, counsel for the Respondents

Investigation Meeting: On the papers and by telephone

Submissions Received: 3 June and 6 July 2020 from the Applicant
 17 June 2020 from the Respondent

Date of Determination: 26 November 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Alexander Clark brings a number of claims against his former employer, Woofingtons Limited ("Woofingtons" or "the company"). The claims include being unjustifiably disadvantaged during his employment by his employer's attempt to vary his individual employment agreement (IEA) from permanent to casual employment and being unjustifiably dismissed on 15 August 2018.

[2] Mr Clark also claims Woofingtons breached the terms of his IEA and breached its statutory duty of good faith towards him. He seeks compensation for lost wages; for rest and meal breaks he claims he should have been remunerated for; for hurt and humiliation; and for

the cost of relocating his household. Mr Clark also seeks the imposition of a penalty on Woofingtons for its alleged breach of good faith and a further penalty for a breach of his IEA.

[3] Woofingtons, a registered company which operates Woofington's Luxury Dog Stay in Brooklyn, Wellington, acknowledges it attempted to vary Mr Clark's IEA but says it did so after discussions with him. It says he suffered no disadvantage as the variations were not pursued after Mr Clark objected.

[4] The company also acknowledges it terminated Mr Clark's employment. It says this followed discussions with him over restructuring his employment. Mr Clark had put forward a proposal to vary his terms of employment but the parties failed to reach agreement resulting in the termination.

[5] Woofingtons accepts the termination of Mr Clark's employment was procedurally flawed but says it could not afford to retain Mr Clark on the terms of his IEA. If it had, Woofingtons says it was inevitable he would have been made redundant. The company initially denied the dismissal was unjustifiable in the circumstances and said it tried to retain Mr Clark in employment but he refused to enter into discussions. In submissions to the Authority, however, Woofingtons accepted that Mr Clark's dismissal was unjustifiable "due to an improper and unlawful process."

The Authority's investigation

[6] This matter had been set down for investigation in May 2020. The hearing was vacated due to the Covid-19 Alert level 4 lockdown and, in the course of a telephone conference with the parties, it was agreed the Authority would determine the matter on the papers by way of affidavits and submissions. Due to lockdown restrictions, the parties were unable to provide sworn affidavits. I spoke by telephone with each witness who provided evidence and had each witness affirm their witness statements.

[7] I am not required to set out all the evidence and submissions I received, and have not done so in this determination, pursuant to s 174E of the Employment Relations Act 2000 (the Act). I have, however, taken all such documentation into consideration before reaching conclusions and making findings on facts and relevant issues of law.

[8] This determination has been issued outside the timeframe set out in s 174D(2) of the Act in circumstances the Chief of the Authority has decided, as he is permitted by s 174D(3) to do, are exceptional.

Issues

[9] The issues for determination are whether:

- (a) Mr Clark was unjustifiably disadvantaged in his employment by unjustifiable actions of his employer;
- (b) Woofingtons breached its statutory duty of good faith to Mr Clark;
- (c) Woofingtons breached Mr Clark's employment agreement;
- (d) a penalty should be imposed.

[10] There is an issue of the appropriate remedy or remedies to be awarded to Mr Clark for his unjustifiable dismissal, as acknowledged by Woofingtons, and for any other claims that may be upheld against his former employer.

Test of justification

[11] The starting point for determining whether a dismissal or other action by an employer is justifiable is the test set out in s 103A (2) of the Act. It 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.

[12] The test is an objective one and the provisions of s 103A (3) specify the matters the Authority must consider in applying it, as well as providing at s 103 (4) that the Authority may consider any other factors it thinks appropriate. Finally, s 103A (5) provides that the Authority must not determine a dismissal to be unjustifiable solely because of defects in the process followed by the employer if the defects were –

- (a) minor; and
- (b) did not result in the employee being treated unfairly.

Evidence of the parties*The Applicant*

[13] Mr Clark gave evidence about the events leading up to his dismissal. He said he had commenced work as a Kennel Assistant on 31 July 2017 on the terms of an IEA, an unsigned copy of which he provided to the Authority.

[14] On 25 June 2018 the Kennel Manager (the manager) emailed employees including Mr Clark noting various matters that were unsatisfactory about the cleaning of kennels and the care of dogs. On the new roster the manager sent to Mr Clark she noted that it was his responsibility on the weekends to make sure staff were "adhering to the roster and not shirking duties." Mr Clark was concerned at this new responsibility he had been given and requested a meeting with the manager after obtaining some advice over his employment rights in this situation.

[15] Mr Clark, with his wife Emily as a support person, met with the manager on 27 June 2018 but left the meeting with his concerns unresolved. He said the manager had told him she could simply put the extra duties and responsibilities for supervising other staff into his IEA. She had laughed when Mr Clark explained there needed to be a proper process and mutual agreement for any change to be made.

[16] Mr Clark said he was confused when he left the meeting and felt his concerns had been dismissed. On 31 July 2018 the manager emailed him a new IEA and told him all employees had been sent new employment agreements. It appears the manager, who did not give evidence to the Authority, is no longer employed by Woofingtons and I have elected not to name her.

[17] On 1 August 2018, Mr Clark said he received another IEA which contained major changes to his terms and conditions of employment, including changes of the days he was to work, a new and different job description, and new responsibilities. Mr Clark said this meant he would be working fewer days, and his employment would change from permanent to casual, which took away his ongoing security of employment.

[18] He said the manager told him on 3 August 2018 he would not be able to work at Woofingtons if he did not sign the IEA. By his evidence, she repeatedly asked him to sign it, telling him all other employees had signed theirs. Mr Clark said he was stressed over what to do and what his rights were.

[19] On Sunday 12 August 2018, Mr Clark responded in writing to the proposed new IEA. He agreed to some of its changes and proposed modifying others. He rejected some changes altogether; sought clarity over one change; and asked for more time to review another to allow him to take independent advice on it. On 15 August 2018 Mr Clark received a letter from his employer terminating his employment, with his two weeks' notice period to be paid in lieu.

[20] Mr Clark described in his written evidence the adverse effects he suffered from his dismissal. These included depression and being unable to work full-time since then due to ongoing issues.

[21] Ms Clark described in her evidence the effects she had witnessed on her husband from his dismissal. Her evidence generally corroborated that of Mr Clark. She also described the flow-on effects on their family which continued to affect them.

The Respondent

[22] Two witnesses gave evidence for Woofingtons, Brian Willman and Robbie Bromley. Mr Willman is the sole director and shareholder of Woofingtons. In an earlier determination I found no grounds for Mr Willman to be joined to these proceedings in a personal capacity as the company was, and remains, registered on the New Zealand Company Register.¹

[23] Mr Willman's short written statement concerned the financial situation of Woofingtons since the company commenced operating in 2015. He attached to his evidence the company's unaudited financial reports for the 2017, 2018 and 2019 financial years. Those reports, and Mr Willman's evidence, suggest the company was in a delicate financial position which was then further impacted by the Covid-19 lockdown of 2020.

[24] Mr Bromley was a kennel hand at Woofingtons and was already employed there when Mr Clark joined the company in July 2017. His evidence included references to events at which he was not present, such as the 27 June 2018 meeting between Mr Clark, Ms Clark and the manager. I found Mr Bromley's observations and opinions about the meeting and the reason for it, as well as his other comments about Mr Clark, to be of little assistance to my investigation due to their speculative nature.

¹ [2019] NZERA 709.

Unjustifiable action

[25] From the evidence it appears the process of trying to obtain Mr Clark's agreement to a new IEA was poorly managed. There is no evidence that the employer gave him any information, financial or otherwise, to explain its rationale for seeking significant changes to his terms and conditions of employment. It simply sent him a new IEA and asked him to sign and return it.

[26] By Mr Clark's account, the manager applied some pressure on him to sign the new IEA. He resisted that pressure and it appears from his evidence that he kept his concerns about the proposed changes to himself for several days before putting them in writing to his manager, as I have noted at [19] above.

[27] Mr Clark experienced some uncertainty and anxiety about his employment and its ongoing security from the time of receiving the new IEA. To that extent his employment was affected to his disadvantage but that does not mean the employer's action in proposing changes to his terms and conditions of employment was unjustifiable.

[28] If, as Woofingtons has submitted, it needed to restructure its business for financial reasons it was entitled to propose changes to Mr Clark's current employment agreement. It was not entitled to change the terms and conditions of his employment unilaterally, but I am not persuaded it did that.

[29] I accept the company's submission that it did not pursue the changes it wanted to introduce after Mr Clark made his objections known to it. The new IEA was not implemented and Woofingtons acknowledged that Mr Clark remained on the terms and conditions of his existing employment agreement in the absence of mutual agreement as to any change. Mr Clark's employment was terminated days later, which I will address shortly.

[30] I find that, while the company's handling of the proposal to change Mr Clark's terms and conditions of employment was less than optimal, its proposal of a new IEA in itself did not constitute an unjustifiable action and I therefore do not accept this claim of Mr Clark's.

Unjustifiable dismissal

[31] Mr Smith, counsel for Woofingtons, accepts in submissions made on the company's behalf that Mr Clark's dismissal was unjustifiable. Counsel submits the company's financial

position meant it was justified in seeking to restructure, but acknowledges that it did so improperly.

[32] Woofingtons is a small company and counsel submits it delegated authority to its then manager to operate the dog stay business. Mr Smith says the company has accepted from the outset that it acted unreasonably and has attempted unsuccessfully to resolve the matter with Mr Clark. It attributes its failure to achieve resolution to the unreasonableness of Mr Clark's expectations.

[33] I accept the company's intention to restructure most likely arose from its precarious financial position. There is no evidence, however, that the company shared any information about its financial concerns with Mr Clark. Initially it simply allocated more responsibilities to him through the roster and, when he queried the lawfulness of that action, it provided him with a new IEA proposing changes to his terms and conditions of employment. When Mr Clark attempted to negotiate those changes, he was dismissed on notice, with his notice period being paid out.

[34] There is no doubt the termination was unjustifiable. Mr Willman stated in the termination letter to Mr Clark that the company felt it had reasonable cause to end his employment because agreement had not been reached and "can not be reached" over changing his duties, days and hours of work. There was, however, no evidence of any attempts made by Woofingtons to reach agreement with Mr Clark. Having received his written response to the new IEA, Woofingtons terminated his employment. That was not the action a fair and reasonable employer could have taken in that situation.

[35] It is Woofingtons' position that retaining Mr Clark on his existing terms and conditions of employment was not sustainable as the company could not meet the wages required and that it was inevitable he would have been made redundant. No information was provided to verify that assertion other than the unsigned and unaudited financial statements attached to Mr Willman's brief written evidence.

[36] In the absence of evidence to support the assertion I reject the inevitability of Mr Clark's redundancy. This will be a factor to be considered when I turn to remedies for Mr Clark's unjustifiable dismissal.

Breach of good faith

[37] In Mr Clark's amended statement of problem of 17 May 2019 he claims the employer breached its duty of good faith under s 4 of the Act, although that breach was not attributed to any specific action. In submissions on behalf of Mr Clark, Ms Campbell referred to the obligation of parties to an employment agreement to be active and constructive in establishing and maintaining productive employment relationships, including being responsive and communicative.

[38] In Ms Campbell's submission, Woofingtons breached its duty of good faith by failing to be responsive and communicative in its dealings with Mr Clark after the termination of his employment. She said this related to the company's "considerable reluctance to settle the matter".

[39] I do not accept that submission for several reasons, the first of which is that, while Mr Clark gave evidence of the process being "dragged out", he did not attribute any delays to Woofingtons. Ms Campbell's submissions are her comments and opinions, not evidence.

[40] Secondly, I am aware the parties attended mediation and that the matter did not resolve in that forum. That is all I am permitted at this stage to know about such matters. I have no knowledge, and nor should I have knowledge, of what occurred in mediation, which is a confidential process.² Accordingly I am not in a position to make any findings about the company's reluctance or otherwise to resolve the employment issues raised by Mr Clark.

[41] The final reason for rejecting Ms Campbell's submission, and Mr Clark's claim, in respect of post-termination behaviour is that I do not consider Woofingtons' duty of good faith survived the termination of Mr Clark's employment.

[42] In reaching that conclusion I note the following statement of Judge Inglis, as she was then, in *Idea Services Ltd v Barker*:

I do not consider that there is scope for arguing that the statutory requirements imposed by s 4 continue to apply once the employment relationship has ended. To do so would be to read into the Act words that are not there. It is notable that s 4(1A)(c) specifically confers an obligation to act in good faith on an employer who is proposing to make a decision that will or is likely to have an

² In accordance with s 148 of the Act.

adverse effect on the continuation of employment, but imposes no such obligation following termination.³

[43] Mr Clark does have grounds for arguing that Woofingtons breached its duty of good faith to him in the manner in which it terminated his employment, although he has not specifically done so. This is in relation to the requirements specified at s 4 (1A) of the Act where an employer is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of the employee's employment.

[44] Woofingtons was in that situation in August 2015 with Mr Clark. It was required under the good faith provisions of the Act to provide him with access to information, relevant to the continuation of his employment, about its decision and to provide him with the opportunity to comment on that information, before reaching any decision to dismiss him. As I have already noted above, there is no evidence Woofingtons provided Mr Clark with any such information.

[45] Mr Clark has raised as a personal grievance matters concerning the process his employer followed that led to the termination of his employment and I have determined that matter in his favour. I will order appropriate remedies for his personal grievance and do not consider I need to explore his claims for a breach of good faith any further in light of the matters canvassed above.

Breach of IEA

[46] Mr Clark did not specify what his employer did that he considered to be a breach of his IEA and nor did his representative make specific submissions on this claim. Ms Campbell did, however, refer to Woofington's "unilateral" attempt to alter the terms of Mr Clark's IEA. I have already rejected that claim in relation to the new IEA provided to Mr Clark.

[47] Another matter referred to in the amended statement of problem concerned the company's direction to Mr Clark on 13 July 2018 to remain on work premises during rest and meal breaks to supervise school-aged employees. Woofingtons acknowledged it had given that direction to Mr Clark and stated its belief that it was a reasonable direction, the purpose of which was that Mr Clark would be available in the event of an emergency.

³ *Idea Services (In Statutory Management) v Barker* [2012] NZEmpC 112; [2012] ERNZ 454 at [19].

[48] Mr Clark's evidence did not make it clear whether he actually undertook the supervisory duties for which he was asked to remain on the premises. It appears from his response of 12 August 2018 to his employer's proposed new IEA that he did not. In that response, Mr Clark referred to it as a proposed change and as one that he did not consider to be "a fair/reasonable/request/offer".

[49] I find there is insufficient evidence for me to accept Mr Clark's claim that his employer breached his employment agreement and accordingly I decline to do so.

Matter arising from submissions

[50] Mr Smith raised a matter in submissions that he asked the Authority to address. The matter concerned an email he received from Ms Campbell, which he alleged constituted misconduct on her part, and for which the Respondent sought a remedy.

[51] The correspondence from Ms Campbell was headed "Without Prejudice" and was properly referred by the Authority Officer dealing with the file to another Member to ascertain whether I should see it. That Member decided there was nothing in the email that warranted protection and it could be put before me.

[52] Having viewed the email in question, I find it to be of no relevance to my investigation of Mr Clark's claims. The Authority has no power to regulate conduct between representatives or to award remedies in respect of conduct complained about by counsel.

Remedies and contribution

[53] Mr Clark has a personal grievance for unjustifiable dismissal for which he is entitled to remedies. He did not contribute to the grievance and accordingly no deductions will be made under s124 of the Act from the remedies that are awarded.

[54] Lost wages is one remedy to which Mr Clark is entitled. His claims under this head include compensation for rest and meal breaks. Mr Clark's IEA provided an entitlement to paid rest breaks and unpaid meal breaks. He provided no evidence that he had not received payment for rest breaks during his employment and no evidence that his employer should have paid him for the unpaid meal breaks. I find he has not established an entitlement to these items.

[55] In evidence written approximately 18 months after the termination of his employment, Mr Clark stated he was still unable to work fulltime. His amended statement of problem lodged in May 2019 included the statement that he had been "unable to work for several weeks". I find an award of three months' wages (13 weeks) to be appropriate. The remuneration is to be paid at his hourly rate at the time of the termination of his employment, which I understand to have been \$17.50, and in accordance with the hours of work in his 2017 IEA.

[56] Mr Clark seeks unspecified costs of relocation of his household. He says he lived in a property owned by the manager at the time his employment was terminated and that he felt too embarrassed to remain there. He provided no evidence of being asked to vacate the property and I find no grounds for his claim, which is declined.

[57] Mr Clark is also entitled to be compensated for the humiliation, loss of dignity and injury to feelings he suffered. I accept that the abrupt termination of his employment had a debilitating effect on him, in a situation where he had been attempting to negotiate in good faith with his employer over the changes to his employment terms and conditions it wished to introduce.

[58] In the circumstances I find an appropriate award of compensation to be \$15,000.

[59] Woofingtons submits its financial situation should be taken into account in the award of remedies. I reject that submission in accordance with the Employment Court's judgment in *Innovative Landscapes (2015) Ltd v Popkin*.⁴

[60] I note, however, the statutory provision for the Authority to order the payment of an award under s 123(1) (b) or (c) by instalment but only where the financial position of the employer requires it. Based on the information provided by Mr Willman in his witness statement and attachments, the financial position of Woofingtons may require such an order.

Orders

[61] Woofingtons Limited is ordered to pay Mr Clark the following sums:

- (a) \$6825.00 gross, being three months' (13 weeks') wages under s 128 of the Act;⁵
- and

⁴ [2020] NZEmpC 40 at [26] to [29].

⁵ Calculated at 7.5 paid hours per day and 4 days per week at an hourly rate of \$17.50.

(b) Compensation of \$15,000 under s 123(1)(c)(i) of the Act.

[62] If either party disagrees with my calculation of wages, it may revert to the Authority within 14 days of the date of this determination. If the Respondent seeks an order for payment by instalment of the sum at [58] (b) it may request that within 14 days providing updated financial information to support the request.

Costs

[63] The issue of costs is reserved. I encourage the parties to resolve costs between themselves but, if they are unable to do so, any application for costs should also take into account the costs that I reserved in my earlier determination : [2019] NZERA 709.

Trish MacKinnon
Member of the Employment Relations Authority