

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 229/07
5047002

BETWEEN Marilyn Heremaia
Applicant

AND Sheddan Investments Ltd t/a
Tokaanu Hotel
Respondent

Member of Authority: Vicki Campbell

Representatives: Tim Oldfield for Applicant
Ken Thurston for Respondent

Investigation Meeting: 9 July at Taupo

Further Information: 31 July 2007

Determination: 2 August 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Heremaia worked as a second chef for the respondent from 2003 until she was dismissed by reason of redundancy on 15 March 2006. Ms Heremaia says that dismissal was both substantively and procedurally unjustified.

[2] Ms Heremaia filed her application in the Authority on 16 April 2007. No statement of reply was filed by the respondent following two written requests for such from the Authority. The Authority set down the investigation meeting to commence at 9.30am on 9 July 2007. A notice of the meeting was served on Ms Karen Forrest, the representative on record for the respondent.

[3] Ms Heremaia attended the investigation meeting at the scheduled time. The respondent was unrepresented. At 9.35am I received a message from the receptionist at Huka Village that Mr Ken Thurston was unable to attend the investigation meeting and that another unnamed person would be attending at 11.00am. After consultation with counsel for the applicant I agreed to delay the investigation meeting until 10.00am to allow the respondent's representative to attend.

[4] A contact cell phone number had been provided by Mr Thurston and arrangements made for the Authority to ring Mr Thurston back immediately explaining the need for the respondent to attend at 10.00am. Approximately 3 minutes after receiving the message the Authority tried on no less than 3 occasions to make direct contact with Mr Thurston, but unfortunately his cell phone did not ring and was therefore not answered. A message was left for Mr Thurston that the investigation meeting would commence at 10.00am and respondent's representative should try and attend as close to that time as possible.

[5] The investigation proceeded at 10.00am as advised to the respondent. No appearance was made on behalf of the respondent at that time. The investigation meeting took approximately one hour and was finished at 11.00am. No appearance for the respondent had been made by that time.

[6] Later that day the Authority contacted Huka Village and was informed that the respondent's representative arrived at 11.10am. In order to provide a further opportunity to the respondent to seek leave and respond to the statement of problem, the Authority made attempts to contact Mr Thurston on his cell phone number on 11, 13 and 17 July. Messages were left but no response has been received.

[7] Eventually a facsimile number was obtained for Mr Thurston and a fax delivered to him requesting him to contact the Authority, which he did. A conference call was arranged and took place on 31 July 2007.

[8] Mr Thurston did not explain or provide any reasons for not lodging a statement in reply in the time required and extended for this purpose. During the conference call he was allowed to reply and respond to Ms Heremaia's claims. It would only be in extraordinary circumstances that the Authority would not grant leave to do so. However, the Regulations make provision for a reply for a reason, and that is, a written reply helps and assists the investigation process.

The issues

[9] I am required to scrutinise the respondent's actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

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.

[10] The test of justification does not change the long-standing principles about justification for redundancy. An employer must act genuinely and not out of ulterior motives. Business decisions about the number of positions required in an organisation are for the employer to make and not the Authority (see *Simpson Farms v Aberhart*, unreported, Employment Court, Colgan CJ, AC52/06, 14 September 2006).

[11] There was no written employment agreement between the parties.

Credibility

[12] The Authority is required to determine the facts on the balance of probabilities, not beyond reasonable doubt as occurs in a criminal case. In addition, while there can be no certainty as to what occurred many months earlier, the Authority must prefer one set of evidence to any other on any particular point in dispute.

[13] I have preferred the evidence of Ms Heremaia. Ms Heremaia's evidence was supported by Ms Jacqui Hurst's evidence. Ms Hurst told the Authority that she was told of the redundancies on 15 March 2006 by telephone from some of her members. Ms Hurst told me the fact of the redundancies was confirmed by the then Hotel Manager on the 17 March 2006. Following a meeting with the hotel manager attempts were made to clarify the situation with Mr Thurston, however he failed to respond to any communications.

Was the redundancy genuine and carried out in a fair and reasonable manner?

[14] Genuineness is considered in relation to whether or not the redundancy was the actual reason for dismissal rather than being a sham (see *Staykov v Cap Gemini Ernst & Young NZ Ltd*, unreported, Travis J, AC 18/05, 20 April 2005). An employer must act genuinely and not out of ulterior motives. Business decisions about the number of positions required in an organisation are for the employer to make and not the Authority (see *Simpson Farms v Aberhart*, unreported, ARC 13/06, 14 September 2006, Colgan J).

[15] Ms Heremaia was employed to work split shifts to cover the breakfast and dinner times at the Hotel. She would generally work from 7.00am to 11.00am and then from 5.00pm until finish, which could be anytime from 10.00pm to after midnight. There was one other employee working in the Kitchen at that time.

[16] Mr Thurston told me that on 15 March 2006 Ms Heremaia initiated a conversation by approaching him and asking him what was happening with the Hotel.

[17] Ms Heremaia say that without any warning or previous consultation, on 15 March 2006 she was advised by Mr Thurston that the Hotel was no longer going to be doing breakfasts and that she was redundant. She was given no notice or told what day she would be finishing.

[18] Ms Heremaia was shocked at the sudden announcement that she would be redundant. After advising other staff members of the decision she went to the office administrator who advised her that her final pay had already been made up and that she had been finished. Ms Heremaia contacted Ms Hurst and advised her of the situation.

[19] There is no dispute that Mr Thurston met with Ms Heremaia on 15 March 2006. However, as already set out I prefer the evidence of Ms Heremaia and Ms Hurst that Ms Heremaia was told she was to be made redundant.

[20] Section 4 of the Employment Relations Act 2000 requires the respondent to deal with Ms Heremaia, in good faith. This duty is to be exercised not only generally but in specific situations, including redundancy.

[21] The duty of good faith set out in the Act requires an employer, proposing to make a decision that will have an adverse affect on the continuation of employment of an employee, to provide to that employee, access to information relevant to the continuation of the employee's employment, and an opportunity to comment on the information before the decision is made. The requirement to consult is therefore, a statutory obligation.

[22] In *Communication & Energy Workers Union Inc v Telecom NZ Ltd* [1993] 2 ERNZ 429, the Court discussed the meaning of "consultation" in the context of redundancy, and listed a series of propositions extracted from the Court of Appeal's decision in *Wellington International Airport Ltd v Air NZ* [1993] 1 NZLR 671 (CA). In particular, the Court noted:

- (a) Consultation requires more than mere prior notification and must be allowed sufficient time. It is to be a reality, not a charade. Consultation is never to be treated perfunctorily or as a mere formality.
- (b) If consultation must precede change, a proposal must not be acted on until after consultation. Employees must know what is proposed before they can be expected to give their view.

- (c) Sufficiently precise information must be given to enable the employees to state a view, together with a reasonable opportunity to do so. This may include an opportunity to state views in writing or orally.
- (d) Genuine efforts must be made to accommodate the views of the employees. It follows from consultation that there should be a tendency to at least seek consensus. Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done.
- (e) The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.

[23] There was no consultation with Ms Heremaia prior to the decision being made to terminate her employment on 15 March 2006. I find, in all the circumstances, the decision to make Ms Heremaia redundant was profoundly unfair. Ms Heremaia was never given formal notice that redundancy was a possibility and there was no consultation over the possibility of the redundancy, in a situation where consultation is expected. The lack of consultation and the manner in which the notification of dismissal was implemented means that none of the usual actions associated with the fair and reasonable treatment of employees in such situations were present.

Given the inherent unfairness in the determination and implementation of the redundancy it can not be said that the redundancy was genuine. I find that the dismissal of Ms Heremaia by reason of redundancy to be unjustified.

Remedies

Lost wages

[24] As set out above I have found Ms Heremaia's dismissal to be unjustified and she is therefore entitled to remedies. Ms Heremaia seeks two weeks pay in lieu of notice and three months lost wages. I accept the submissions made on Ms Heremaia's behalf that two weeks notice is reasonable in the circumstances.

[25] Ms Heremaia took steps to mitigate her loss and found alternative employment two weeks after her dismissal, albeit on a lesser wage than she had enjoyed when working for the respondent.

[26] After her dismissal, Ms Heremaia attempted to make contact with Mr Thurston to discuss her redundancy. She eventually made contact with his secretary who advised her Mr Thurston would be at the Hotel and a meeting was arranged for the week after Easter. Mr Thurston did not arrive. Mr Thurston says he was in Taupo, but it was contingent on Ms Heremaia contacting the hotel and arranging a time to see him.

[27] A further meeting was arranged for 30 May 2006 but again Mr Thurston failed to front. By May an offer of reinstatement was on the table for discussion

and was formally confirmed through correspondence in September 2006. This was some five months after Ms Heremaia's dismissal. Ms Heremaia told me that Mr Thurston was very difficult to make contact with and he would not return phone calls.

[28] I am satisfied that in the circumstances of this case, it was open to Ms Heremaia to refuse the offer of reinstatement. She had already had another job. The offer of reinstatement came with a statement from Mr Thurston that he would run his businesses as he saw fit and provided no recognition of the hurt and humiliation caused by the abrupt ending of Ms Heremaia's employment. This has caused Ms Heremaia to question whether or not she has any confidence in Mr Thurston's ability to treat her fairly and reasonably in the future.

Sheddan Investments Ltd t/a Tokaanu Hotel is ordered to pay Ms Heremaia two weeks pay in lieu of notice being \$840.00 gross within 28 days of the date of this determination.

Further Sheddan Investments Ltd t/a Tokaanu Hotel is ordered to pay to Ms Heremaia three months loss of wages of \$2,495.59 (calculated as \$420 X 12 weeks less \$2,544.41 being earnings from her new employment) pursuant to section 123(b) of the Employment Relations Act 2000 within 28 days of the date of this determination.

Compensation

[29] I accept Ms Heremaia was upset by her dismissal. Ms Heremaia described the embarrassment she felt in losing her job and having to explain to people within her small local community why she was no longer employed at the Hotel. Ms Heremaia's dismissal came the day before a ½ page advertisement was published by the respondent in the local newspaper in which Ms Heremaia's photo was used. This exacerbated her embarrassment.

[30] I am bound by section 124 of the Act to consider the extent to which Ms Heremaia's actions contributed towards the situation that gave rise to her personal grievance and if those actions so require to reduce the remedies that would otherwise have been awarded accordingly.

[31] I am not satisfied it is just to reduce the remedies in this case. Ms Heremaia's actions have not contributed towards the situation that gave rise to her personal grievance.

Sheddan Investments Ltd t/a Tokaanu Hotel is ordered to pay Ms Heremaia \$5,000 without deduction pursuant to section 123(1)(c) of the Employment Relations Act 2000, within 28 days of the date of this determination.

Costs

[32] Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined.

Vicki Campbell
Member of Employment Relations Authority