

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2019] NZERA 681  
3048299

BETWEEN SARAH JARVIS  
Applicant

A N D FLYNN TRAVEL LIMITED  
Respondent

Member of Authority: Peter van Keulen

Representatives: Timothy Jackson and Jonathan Loh, counsel for the Applicant  
Tony Shaw, counsel for the Respondent

Investigation Meeting: 16 September 2019

Submissions Received: 24 September 2019 and 8 October 2019 from the Applicant  
1 October 2019 from the Respondent

Date of Determination: 28 November 2019

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Flynn Travel Limited operated a travel agency in Timaru under the Helloworld franchise.

[2] Sarah Jarvis and Katherine Flynn, a director and shareholder of Flynn Travel and essentially the general manager of the business, discussed the possible sale and purchase of the Flynn Travel business in 2017.

[3] Ms Jarvis became interested in purchasing Flynn Travel's business but she did not have recent experience as a travel agent nor did she have any knowledge of how the business operated.

[4] It was against this backdrop that Ms Jarvis started work for Flynn Travel in its Helloworld business on 24 October 2017. The understanding was that Ms Jarvis would learn how the business operated with a view to purchasing it in the future.

[5] This relationship progressed through 2018, and Ms Jarvis and Ms Flynn began further discussion about the possible purchase of the Flynn Travel business in May 2018. As part of the discussions, Ms Jarvis signed a non-disclosure agreement with Flynn Travel in June 2018.

[6] In July 2018, Ms Flynn discovered that Ms Jarvis had sent confidential information about the Flynn Travel business to her potential business partners, who had also signed a non-disclosure agreement with Flynn Travel.

[7] Because of this action, Flynn Travel commenced a disciplinary process with Ms Jarvis, which led to Flynn Travel suspending Ms Jarvis and then dismissing her.

[8] Flynn Travel stopped its negotiations with Ms Jarvis about the potential purchase of its business and then it sold its business to another party.

[9] Ms Jarvis lodged a statement of problem setting out three claims based on these events:

- (a) A personal grievance for unjustified action causing disadvantage, for the suspension.
- (b) A personal grievance for unjustified dismissal.
- (c) A claim for damages arising out of the abandoned sale of the Flynn Travel business to Ms Jarvis, which Ms Jarvis says is a breach of her employment agreement.

[10] In written submissions for Ms Jarvis, her counsel also put forward an argument that Flynn Travel was estopped from terminating Ms Jarvis' employment on the basis that her employment was for the purpose of working toward the purchase of the business and it is unconscionable to allow Flynn Travel to resile from that, by dismissing Ms Jarvis.

[11] Flynn Travel denies these claims.

## **Issues**

### *Unjustified disadvantage*

[12] An unjustified disadvantage grievance is based on an allegation that an employer's action (or actions) has caused disadvantage to an employee's employment or a condition of his/her employment and the action is not justified.

[13] As Flynn Travel suspended Ms Jarvis and this caused disadvantage to her employment the issue to resolve is, was the action of suspending Ms Jarvis justified?

### *Unjustified dismissal*

[14] In order to resolve the unjustified dismissal grievance I must decide whether Flynn Travel's actions in deciding to dismiss Ms Jarvis were what a fair and reasonable employer could have done in all of the circumstances<sup>1</sup>. This involves two aspects. First, whether the process by which Flynn Travel decided to dismiss Ms Jarvis, was justified. And second, whether Flynn Travel's decision to dismiss Ms Jarvis was substantively justified.

### *Breach of contract*

[15] Ms Jarvis says the discussions around her buying the business prior to her employment were such that it became a term of her employment. She says that because Flynn Travel sold its business to someone else after she had been dismissed it breached her employment agreement.

[16] In order to resolve this claim I will need to determine if the sale of the Flynn Travel business to Ms Jarvis was a term of her employment and if it was, if Flynn Travel then breached that term.

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<sup>1</sup> Section 103A of the Employment Relations Act 2000.

## *Estoppel*

[17] The requirements for estoppel have been set out by the Court of Appeal in *National Westminster Finance New Zealand Ltd v National Bank of New Zealand Ltd*.<sup>2</sup> At page 550

Tipping J summarised the requirements as:

The authorities show that for an estoppel by convention to arise the following points must be established by the party claiming the benefit of the estoppel (the proponent):

- (1) The parties have proceeded on the basis of an underlying assumption of fact, law, or both, of sufficient certainty to be enforceable (the assumption).
- (2) Each party has, to the knowledge of the other, expressly or by implication accepted the assumption as being true for the purposes of the transaction.
- (3) Such acceptance was intended to affect their legal relations in the sense that it was intended to govern the legal position between them.
- (4) The proponent was entitled to act and has, as the other party knew or intended, acted in reliance upon the assumption being regarded as true and binding.
- (5) The proponent would suffer detriment if the other party were allowed to resile or depart from the assumption.
- (6) In all the circumstances it would be unconscionable to allow the other party to resile or depart from the assumption.

[18] I will determine if these requirements have been met such that Flynn Travel was estopped from dismissing Ms Jarvis thereby preventing her from purchasing the Flynn Travel business.

## *Remedies*

[19] If I find that Flynn Travel did act unjustifiably in suspending Ms Jarvis or in dismissing Ms Jarvis and/or it did breach Ms Jarvis' employment agreement or was estopped from dismissing her, then I will need to consider remedies. If I award any monetary remedies to Ms Jarvis for her personal grievances, I will also need to consider contribution.

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<sup>2</sup> *National Westminster Finance New Zealand Ltd v National Bank of New Zealand Ltd* [1996] 1 NZLR 548 (CA).

## **Pre-employment negotiations**

[20] Both parties agree that prior to Flynn Travel employing Ms Jarvis, Ms Jarvis and Ms Flynn had discussed the potential sale of the Flynn Travel business to Ms Jarvis. And, both agree that she commenced employment, being trained as a manager in the travel business, with a view to her purchasing the business.

[21] Ms Jarvis says the discussions between her and Ms Flynn about the purchase of the business became a term of her employment, a term that required Flynn Travel to sell its business to her.

[22] Ms Flynn says the discussion about the sale of the business amounted to nothing more than a shared intention that the parties would explore and negotiate a possible purchase of the business, after Ms Jarvis had worked in the business for a while and had assessed if working in the travel industry suited her.

[23] Whilst Ms Jarvis and Ms Flynn's evidence conflicted there are some aspects that were not disputed:

- (a) Ms Flynn's employment agreement was initially a fixed term agreement until 31 March 2018 as Ms Flynn had hoped any agreement to purchase the business could be negotiated and completed before the end of the financial year.
- (b) The fixed term provision in Ms Jarvis' employment agreement referred to Flynn Travel evaluating the possibility of Ms Jarvis managing a travel agency.
- (c) There was no term in Ms Jarvis' employment agreement referencing the purchase of the business.
- (d) Prior to Ms Jarvis commencing employment, there was no actual agreement for the sale and purchase of the Flynn Travel business. There had been no discussion about price, let alone an agreement on price. Ms Jarvis had not undertaken any due diligence, a sale and purchase agreement had not been drafted or discussed, Ms Jarvis was not even sure how she might structure the purchase from her perspective or how it would be financed and there was no

detail around completion, handover and post purchase transitional arrangements.

(e) Ms Jarvis was not obliged to purchase the business and could have walked away from Flynn Travel if she did not want to continue in the travel industry.

[24] Reflecting on the evidence it appears to me that at best the parties had an agreement that they would negotiate the sale of the Flynn Travel business to Ms Jarvis, if after working in the business she decided she was interested.

[25] The evidence does not show that the parties had reached any kind of binding or enforceable agreement on the sale and purchase of the business, whether as a term of Ms Jarvis' employment or otherwise. There was no offer and acceptance, consideration, mutuality of obligation or the necessary certainty.

[26] It also follows that there was not an underlying assumption regarding the purchase of the business by Ms Jarvis that was sufficiently certain to found an argument for estoppel.

[27] Overall, I do not accept that Flynn Travel was in some way bound to keep employing Ms Jarvis so that she could purchase its business nor was it bound to keep negotiating the possible sale of the business with her until it was concluded. Nothing in the negotiations prior to Ms Jarvis commencing employment reached a level of certainty such that Flynn Travel was obligated in these ways – based either on contract law or on estoppel.

### **Negotiations over the purchase of the business**

[28] As part of Ms Jarvis' training and in line with the possible purchase of the Flynn Travel business, Ms Jarvis attended a Helloworld conference in May 2018.

[29] When Ms Jarvis returned from the conference, she began working on her potential purchase of business. She signed a non-disclosure agreement with Flynn Travel on 7 June 2018; she then received some financial information from the Flynn Travel accountant. Ms Jarvis also made enquiries about finance for the possible purchase.

[30] As there were some issues with potential finance, in June 2018, Ms Jarvis spoke to Sue and Paul Robinson, who she had met at the Helloworld conference and who own four Helloworld franchises, about a possible partnership.

[31] Ms Jarvis then spoke to Ms Flynn about the possible partnership with the Robinsons and Mr and Mrs Robinson signed a non-disclosure agreement with Flynn Travel on 21 June 2018.

[32] Mr and Mrs Robinson, Ms Jarvis and Ms Flynn then met on 27 June 2018 to discuss the potential sale of the business. A number of matters were discussed in that meeting. One of the main areas discussed concerned how completion of any sale would be actioned. In this regard issues discussed included the apportionment of existing business (pre and post completion), Ms Flynn's ongoing involvement in the business post completion, any subsequent restraint on Ms Flynn in terms of her competing with the business, the valuation of the business and a possible warranty as to turn over, which would be backed by an earn out or some form of deferred consideration conditional on turnover targets being met.

[33] Mr and Mrs Robinson had concerns about the ongoing turnover of the Flynn Travel business, particularly with Ms Flynn being such a large component of the business and it being their intention to have her leave the business relatively quickly after completion. In order to understand this problem and identify if it was a concern Mrs Robinson asked Ms Jarvis to download and send to her a report containing information about all of Flynn Travel's clients and the business turnover.

[34] Ms Jarvis sent Mrs Robinson this report on 29 June 2018.

[35] Ms Flynn subsequently discovered that Ms Jarvis had sent this report to Mrs Robinson and was concerned about the disclosure of what she believed was confidential information. Ms Flynn contacted her lawyer, took some advice and then decided to commence a disciplinary process with Ms Jarvis.

## **Suspension**

[36] Flynn Travel's lawyer wrote to Ms Jarvis on 6 July 2018. This letter invited Ms Jarvis to attend a disciplinary meeting on 9 July 2018 and it set out the allegation to be discussed, relating to the alleged disclosure of confidential information.

[37] In this letter, the lawyer also advised that because of the serious nature of the allegation Flynn Travel proposed to suspend Ms Jarvis on full pay pending the outcome of the process. Ms Jarvis was invited to respond to that proposal by the end of the day.

[38] Ms Jarvis spoke to Flynn Travel's lawyer in the afternoon of 6 July 2018. She confirmed that she would attend the disciplinary meeting as invited and there was a discussion about the possible suspension. Following that discussion Ms Flynn decided to suspend Ms Jarvis. Ms Jarvis was advised of this by email on 6 July 2018.

[39] The issue of whether this action of suspending Ms Jarvis was justified is answered by considering whether Flynn Travel carried out a fair process in coming to the decision to suspend Ms Jarvis and whether that decision was substantively justified.

[40] I am satisfied that the suspension of Ms Jarvis was carried out in a fair manner and was substantively justified. On this basis, whilst the suspension may be an action, which caused disadvantage to Ms Jarvis' employment or a condition of her employment, the action was justified.

## **Dismissal**

[41] Rather than attending the disciplinary meeting on 9 July 2018, Ms Jarvis took legal advice and then set out her response to the allegations in writing.

[42] Flynn Travel then made its decision on 19 July 2018 concluding that dismissal was the appropriate outcome as:

- (a) Ms Jarvis had disclosed confidential information, which was also a breach of privacy leaving Flynn Travel exposed to a potential claims under the Privacy Act 1993.

- (b) The information was not provided for the purpose of furthering Flynn Travel's business objectives.
- (c) The information had been disclosed without the consent of Flynn Travel.
- (d) The disclosure was a breach of the confidentiality provision in Ms Jarvis' employment agreement.
- (e) The non-disclosure agreements between Flynn Travel and each of Ms Jarvis and Mr and Mrs Robinson, did not create a right for either Ms Jarvis or Mr and Mrs Robinson to have access to the information.

[43] I must determine if this decision to dismiss is justified given the process carried out and the substantive justification.

[44] The requirements for a fair process are informed by the test for justification under the Employment Relations Act 2000<sup>3</sup> (the Act) and the obligations relating to the duty of good faith<sup>4</sup>. In order to meet the requirements for procedural fairness, Flynn Travel needs to show that it:

- (a) investigated the allegation properly;
- (b) raised the allegation with Ms Jarvis providing her with all of the relevant material relating to its investigation and the allegation;
- (c) gave Ms Jarvis an opportunity to respond to the material and the allegation;  
and
- (d) listened to what Ms Jarvis said and considered her explanation as part of its decision making process.

[45] I am not satisfied that Flynn Travel did enough to investigate the alleged disclosure of confidential information – Ms Flynn simply took the email on face value. She could have spoken to other employees to see if they were aware of what occurred and may have assisted or even inadvertently approved of the disclosure. But, more importantly she could also have

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<sup>3</sup> Section 103A of the Employment Relations Act 2000.

<sup>4</sup> Sections 4 and 4A of the Employment Relations Act 2000.

spoken to Mrs Robinson to confirm what was disclosed, why it was disclosed and what had been done with the information.

[46] That said, the failure to properly investigate may have been remedied if Ms Jarvis had been given a full opportunity to explain her actions and address the concerns. The real problem with the process is that I am not satisfied that Flynn Travel properly explained its concerns to Ms Jarvis and provided her with the necessary information. This is best shown by the fact that the conclusions drawn about Ms Jarvis' behaviour are not raised as possible concerns for Flynn Travel in the disciplinary letter. As a result, Ms Jarvis was not able to address some of the concerns such as, the suggestion that disclosing the information was a potential breach of the Privacy Act 1993.

[47] Then, it is not clear that Flynn Travel properly considered Ms Jarvis' explanation, which she did provide, particularly as that might have explained the conduct and informed the outcome. This impacts directly on the question of justification.

[48] There are two aspects to this. First, given Ms Jarvis' explanation it is not clear to me that a fair and reasonable employer could have concluded that Ms Jarvis had breached the confidentiality provision of her employment agreement.

[49] Clause 9.2 of Ms Jarvis' employment agreement prohibits the disclosure of confidential information except for purposes relating directly to furthering Flynn Travel's business objectives.

[50] Ms Jarvis clearly explained that she had disclosed the information as part of the due diligence and negotiations for the sale of the Flynn Travel business, and I fail to see how a fair and reasonable employer could conclude that the sale of the Flynn Travel business was not a business objective.

[51] Second, from my analysis of the evidence it appears that a fair and reasonable employer could have had regard to the following matters raised by Ms Jarvis or what would have been otherwise clear from the circumstances:

- (a) The disclosure was made in the context of the potential sale of the business to a person who appeared to be authorised to receive documents. Flynn Travel

knew Mrs Robinson was a potential partner and purchaser of the business and was engaged in due diligence. In fact, Flynn Travel had enabled that diligence and negotiation over the sale of the business previously, which Ms Jarvis was aware of and party to. There was a non-disclosure agreement in place which Ms Jarvis believed covered and authorised the disclosure she made and she believed she was allowed to provide the information requested (due to previous discussions about providing Mrs Robinson with information).

- (b) Ms Jarvis was led by Mrs Robinson in terms of what she provided and her behaviour was not really culpable but simply naïve and perhaps a little thoughtless.
- (c) Whilst Flynn Travel valued the information disclosed highly, there was limited scope for damage from its disclosure given protections against competition in the franchise agreement (which Mrs Robinson was bound by given her other franchises). And in any event any harm could have been limited immediately by requesting the return of the information directly from Mrs Robinson and seeking an undertaking that it had been returned with any copies destroyed and any information that might otherwise remain would not be used.

[52] There is no evidence that Flynn Travel turned its mind to these circumstances when considering what conduct Ms Jarvis had carried out and the consequences of that conduct. Further, Flynn Travel did not consider any alternatives to dismissal, given these circumstances. This was exacerbated by the fact that it did not ask Ms Jarvis about dismissal as a proposed sanction, which would have been appropriate.

[53] Overall, I conclude that Flynn Travel reached a conclusion regarding the conduct that a fair and reasonable employer could not have concluded and it did not properly consider the circumstances outlined to the extent that they might mitigate the conduct or inform the question of whether dismissal was the appropriate sanction.

[54] I conclude that Flynn Travel's dismissal of Ms Jarvis was unjustified.

## **Remedies**

[55] As Flynn Travel unjustifiably dismissed Ms Jarvis, I must consider what remedies Ms Jarvis may be entitled to.

### *Reimbursement*

[56] Ms Jarvis seeks reimbursement for the earnings she has lost as a result of her unjustified dismissal pursuant to ss 123(1)(b) and 128 of the Act.

[57] I am satisfied that Ms Jarvis has a personal grievance and that she has lost remuneration because of that grievance, so pursuant to s 128 of the Act I must award her the lesser of the lost remuneration or three months ordinary time remuneration.

[58] Ms Jarvis was paid a salary of \$55,000.00. This means her ordinary time remuneration for three months is \$13,750.00.

[59] Ms Jarvis began new permanent full time employment on 1 October 2018, which paid more than her salary at Flynn Travel. So, Ms Jarvis' actual loss stops at this point. Ms Jarvis' loss for the period 16 July 2018 until 1 October 2018 is the amount she would have been paid at Flynn Travel less any amounts she was paid in other work during this time. I calculate the actual loss to be \$2,992.00.

[60] Ms Jarvis' lost remuneration is less than three months ordinary time remuneration and therefore I award this amount, for reimbursement, being \$2,992.00.

### *Compensation*

[61] I can award compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c) of the Act. This is compensation for the humiliation, loss of dignity and injury to feelings suffered because of the unjustified dismissal.

[62] What I must do is identify the harm – humiliation, loss of dignity and injury to feelings - caused to Ms Jarvis and the loss she suffered. Then I must quantify that harm and loss by assessing where it sits on the spectrum of loss and harm.<sup>5</sup>

[63] Ms Jarvis' evidence on the impact of the dismissal on her was limited. She told me she was devastated by the decision as she had had made a commitment to the travel industry and saw a life for herself in Timaru. She felt betrayed by the decision and was shocked as she thought it would not happen.

[64] When assessing the value of the loss and harm suffered by Ms Jarvis based on the evidence described I have considered the recent decisions of the Employment Court, which provide guidance on the assessments.<sup>6</sup>

[65] I think this harm and loss sit well below the middle of the spectrum, and consider that the compensation sits at the lower end of the spectrum. I quantify the compensation payable to be \$13,000.00.

#### *Contribution*

[66] As I have awarded remedies I must consider whether Ms Jarvis has contributed to the situation that gave rise to her unjustified dismissal.<sup>7</sup>

[67] In doing this assessment I am looking for a causal link between any of Ms Jarvis' actions and the situation that gave rise to her dismissal. If I am satisfied that there is a link, then I must consider whether the behaviour was culpable or blameworthy, such that I should reduce the remedies I have awarded.<sup>8</sup>

[68] Ms Jarvis' action in providing the report to Mrs Robinson contributed to her dismissal. However, I accept that this behaviour was not blameworthy or culpable – Ms Jarvis believed she was entitled to disclose the report and as I have indicated I do not believe a fair and reasonable employer could have concluded this was a breach of her employment agreement or

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<sup>5</sup> *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

<sup>6</sup> *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71, *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132, *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

<sup>7</sup> Section 124 of the Act.

<sup>8</sup> *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136

that dismissal was the appropriate sanction given the circumstances. Therefore, there is no contributory behaviour and no reduction in remedies.

### **Outcome**

[69] Flynn Travel did not act in an unjustified manner when it suspended Ms Jarvis.

[70] Flynn Travel unjustifiably dismissed Ms Jarvis and in satisfaction of this grievance Flynn Travel must pay Ms Jarvis:

- (a) \$2,992.00 (gross) for lost remuneration pursuant to s 123(1)(b) and s 128 of the Employment Relations Act 2000; and
- (b) \$13,000.00 without deduction for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

[71] Flynn Travel did not breach Ms Jarvis' employment agreement by not concluding a sale of its business with her; neither was it estopped from dismissing her such that it should have concluded a sale of its business with her.

### **Costs**

[72] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[73] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 14 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen  
Member of the Employment Relations Authority