

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2024] NZERA 169
3192419

BETWEEN

TANIA KEANE
Applicant

AND

GENUINE NZ LIMITED
Respondent

Member of Authority: Sarah Kennedy-Martin

Representatives: Paul Mathews, advocate for the Applicant
Charles Johnson, advocate for the Respondent

Investigation Meeting: 19 December 2023 in Blenheim

Submissions and other information received: 20 December 2023 and up to 14 March 2024 from Applicant
22 January and up to 14 March 2024 from Respondent

Determination: 22 March 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Tania Keane was employed by Genuine NZ Limited (GNZ) for approximately three months in 2022 to carry out sales and marketing tasks with a new business that was starting to manufacture a pet food product called Petpow. Ms Keane was dismissed and says this was unjustified. She seeks lost wages, compensation and costs.

[2] GNZ is a limited liability company having its registered office in Blenheim. Ms Harris is one of two directors of GNZ. The other director is Ms Harris' daughter Coco Chinn. Ms Chinn is the sole shareholder.

[3] GNZ says Ms Keane resigned when she walked out of a meeting with Ms Harris on 9 June 2023. If that is not the case, then her employment was terminated for cause

by way of a letter of termination handed to Ms Keane at the next meeting they had on 13 June 2022. GNZ says its actions are justified but in the event the Authority finds otherwise, it says any remedies should be significantly reduced due to Ms Keane's conduct which contributed to the employment relationship problem that led to the termination.

[4] An earlier Authority determination found Ms Keane was an employee of GNZ rather than a contractor.¹

The Authority's investigation

[5] For the Authority's investigation written witness statements were lodged from Ms Keane and Shane Fitzgerald. Ms Harris gave evidence for GNZ. Ms Keane and Ms Harris answered questions under oath or affirmation.

[6] Ms Keane was represented by Paul Mathews but at the start of the investigation meeting I was advised she wished to represent herself because Mr Mathews was unavailable to attend the last minute. Mr Mathews then provided written submissions on Ms Keane's behalf and provided further information the Authority requested about lost wages. Mr Johnson provided oral and written submissions on behalf of GNZ and responded to the further information provided by Mr Matthews up until 14 March 2024.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[8] The issues requiring investigation and determination were:

- (a) Whether Ms Keane was dismissed?
- (b) If Ms Keane was dismissed by GNZ, were its actions and how it carried out the dismissal, what a fair and reasonable employer could have done in all the circumstances at the time?

¹ *Tania Keane v Genuine NZ Limited and Genuine NZ International Limited* [2023] NZERA 304.

- (c) If GNZ is found to have acted unjustifiably what remedies should be awarded to her considering lost wages and compensation under s123(1)(c)(i) of the Act.
- (d) If any remedies are awarded, should they be reduced under s124 of the Act for blameworthy conduct by Ms Keane that contributed to the situation giving rise to her grievance?

Sales and marketing for a start-up business

[9] GNZ was starting a new business venture manufacturing and marketing a pet food product called Petpow. In March 2022, Ms Harris employed Ms Keane on \$22.00 per hour to assist Ms Keane's friend Kim setting up and running a bed and breakfast. This was Ms Harris' business venture. At the same meeting Ms Harris offered Ms Keane a second job marketing Petpow products.

[10] There was a verbal agreement and the majority of their communications took place over WhatsApp because the work was remote with Ms Chinn based in Christchurch. With no workplace they met at cafes and in each other's homes from time to time.

[11] It transpired Ms Keane mostly did Petpow work. Ms Keane provided invoices for payment for her time. Her weekly hours varied between seven and 28 hours per week. Ms Keane's business card recorded her role as "sales executive" and she had a credit card for business purchases.

[12] From the minutes of meetings held it is apparent the company was in its infancy. Those minutes record the tasks assigned to Ms Keane as being:

- Automated emails
- Facebook posts
- Look into Farmers Market stalls
- Contact New World
- Create a spreadsheet (with another worker) to track numbers on trial and positive and negative feedback
- Tidy up Facebook

- Automate and tidy up Wix and look into training
- Start an FAQ page a product

[13] Difficulties quickly arose between Ms Keane and Ms Harris. Ms Harris had issues with how Ms Keane was conducting herself but admits she did not address those directly with Ms Keane. Ms Keane was very enthusiastic about her role and appeared to be moving faster in her thinking about development of the business than Ms Harris was wanting. Despite Ms Harris' attempts to slow Ms Keane down, Ms Harris continued to pursue courses of action she felt were important to the business, even when Ms Harris was not ready or had asked her to slow down.

[14] Ms Harris gave evidence that by May 2022 she was trying to gently dissuade Ms Keane from upsetting others. Another worker spoke to Ms Harris about how Ms Keane communicated with her and another person at the factory where the product was being manufactured, also spoke to Ms Harris. Neither gave evidence.

[15] In Ms Harris' view, tensions reached the point where she could no longer have Ms Keane attend the factory whereas Ms Keane says she was never told she had done anything wrong so did not understand the resistance to her ideas or the need for changes that Ms Harris went on to implement.

[16] The lack of understanding of each other's position played out in three events, a WhatsApp exchange between Ms Harris and Ms Keane about attendance at the factory, a meeting at Ms Harris' house to clear out the garage and the 13 June meeting that ended with Ms Harris informing Ms Keane she could no longer work with her and handing Ms Keane a pre prepared termination letter.

WhatsApp exchange

[17] On 1 June 2022, over WhatsApp a dispute arose between them about Ms Keane going to the factory. Ms Harris wanted to go to the factory to understand the workflow correctly so she could work on automating the sales workflow. The WhatsApp messages show Ms Harris counselled Ms Keane to take a measured approach with a worker at the factory and Ms Keane's co-worker:

That's great. Please act like you are keen to learn about the process and not give recommendation on improvement. But let me know if there are better ways. [they] are both very protective about the factory. The last thing I want is to be told they don't want you there. I know it's very frustrating but we

need to accept this is all we have to work with right now. I know you want to help but they will feel you are taking over. I don't need the drama. I hope you understand.

[18] Ms Keane offered to wait until Ms Harris was back from holiday so they could meet first and Ms Harris agreed that would be good so they could agree a plan first. Then Ms Keane said she was frustrated because this was making her job harder:

I really do understand you are frustrated Leanne, it is very frustrating for me too as it is making my job harder. I am currently trying to set up the automated sales workflow which will essentially make [the other employee's] job easier but I'm currently flying blind as I don't know what the process is when someone purchases. I cannot do my job properly when I cannot communicate with half of the team.

[19] Ms Harris replied:

I know that. I need your understanding and I need some time to work it out at the factory. Let's have a meeting in 15 mins so we can take control and have a plan.

[20] Ms Keane responded:

I will stay away this week, I can't be bothered with the drama either. It actually upsets me that you think you need to tell me how to behave as to not upset your other staff. I am being treated as though I have done something wrong when realistically all I did was get employed last and I have only ever tried to help. seeing as how my plans for the day have now changed I was going to take an hour for myself this morning before going and helping kim, will talk later.

[21] Ms Harris then said:

See Tania that's exactly not the drama I need. I am upset now because you simply do not understand how desperate I am trying to balance everything out. I simply can't message you and have you distrusting my intentions. I feel like I can't talk to you frankly about my problems at the factory I am having now. You have no idea how I am being treated right now.

[22] Ms Keane then apologised for upsetting Ms Harris and said she was only trying to help.

9 June meeting at Ms Harris' house

[23] Ms Harris arrived back from holiday and invited Ms Keane to Ms Harris' house along with her friend Kim to clear out the garage. Ms Harris had already decided to address the concerns conveyed to her about Ms Keane's communication style by finding a way to avoid having contact between Ms Keane and others. The rationale for clearing the garage was to store Petpow products there and not the factory and for Ms

Keane to work on the Nelson market so as to minimise contact with others who were unhappy.

[24] Ms Keane said in her evidence she used this meet up as an opportunity to discuss the previous argument over WhatsApp. Ms Keane cannot remember what was being said but says Ms Harris became increasingly angry to the point Ms Harris stood up and yelled down at Ms Keane who was sitting down. Ms Keane became very upset and removed herself as a way to deescalate Ms Harris' behaviour and walked to her partner's work.

[25] Ms Harris says she was hoping that she would be able to explain to Ms Keane delicately the situation with the factory and the other worker in an informal setting. Ms Harris denies getting angry or shouting and said she and Kim were standing the whole time and Ms Keane was sitting down so she did not stand up or over Ms Keane. Ms Harris recalls telling Ms Keane not to go to the factory from now on, but she says Ms Keane became tearful and stormed off.

[26] Ms Harris said she was trying to communicate how delicate the situation was and did not want to tell her the others did not want her to be there. Ms Harris sent a text message to Kim later that morning at 11.24 am that she says was an example of her still trying to appease the situation.

[27] In that text Ms Harris states she thinks Ms Keane is not ready for working in a team yet and asks Kim to take care of her and help at the bed and breakfast. She says Ms Keane cannot take criticism, understand different dynamics or take instructions from anyone. She also records she had spoken to Ms Chinn who indicated she was having the same issues with Ms Keane.

[28] Ms Harris also gave evidence that she assumed because Ms Keane had stormed off she had resigned from her role with Petpow.

Formal meeting 13 June at the factory

[29] On the following Monday Ms Keane discovered she could not access the work applications so contacted Ms Chinn and then Ms Harris and was invited to a meeting at the factory to discuss her involvement with Petpow. Ms Harris' husband also attended. Ms Keane said she thought it was strange Ms Harris wanted the meeting to be formal at the factory office. She was also aware Ms Harris had not elaborated further about

what the meeting was about so she made the decision to use her phone to record the meeting.

[30] The meeting commenced with a discussion about what happened on 9 June at Ms Harris' house, Ms Keane walking away and then being locked out of the work applications. Ms Keane said she was concerned about whether she still had a job and Ms Harris told her that was why she had called the meeting. Ms Keane admitted she probably should not have got up and walked out of the previous meeting.

[31] After a heated discussion about their respective positions on events that had occurred, Ms Harris conveyed she was terminating the contract between them and giving Ms Keane two weeks' notice. Ms Harris said she could no longer work with someone who would not take instructions from her. The discussion continued for some time with Ms Keane saying she did not understand because all she had done was ask questions and Ms Harris saying the position was untenable for her because Ms Keane would not listen.

[32] Ms Keane said it was her understanding she was to become the national sales manager but struggled because Ms Harris would not let her have control over anything and found herself unable to make progress setting up and running the business. Ms Harris pointed out it was not Ms Keane's role to control the business or Ms Harris. Ms Keane on the other hand repeatedly said she was trying to help.

[33] Ms Harris also did not accept the role offered to Ms Keane was a national role but she accepted at the investigation meeting that she had been impressed by Ms Keane and had high hopes for her in the business until she reached the conclusion that Ms Keane would not take direction from her.

[34] Towards the end of the meeting Ms Harris gave Ms Keane a termination letter signed by Ms Chinn and Frank Tsai, shareholder, terminating her contract with GNZ. The letter was dated 9 June, which was the previous Thursday, the day of the disagreement at Ms Harris' house. Ms Keane messaged both Ms Chinn and Mr Tsai to seek clarification about the termination letter but they did not reply. Later that day she received another termination letter signed by Ms Harris terminating her employment with GNZ.

Did Ms Keane resign or was she dismissed?

[35] I find Ms Keane was dismissed. On an objective analysis of what happened at the 9 June meeting, Ms Keane's actions in walking away from the meeting about the garage cannot be considered to be a resignation. This was an argument that escalated but there was a cooling off period and Ms Harris wanted to meet with her the following Monday to discuss what had happened and try to explain gently the rationale for why she wanted separation between Ms Keane and some of the others involved in Petpow.

[36] Unlike other cases where a walking off after an argument has been found to be a resignation, there was no evidence Ms Keane said she was quitting or of her tendering her resignation and she returned the following Monday. Her employer appeared to adopt a wait and see approach with a cooling off period before calling a meeting to discuss.² While Ms Keane did not return straight away because the 9 June was a Thursday and she returned to work on Tuesday 13 June, in the context of this relationship that was less relevant because her hours were parttime, worked flexibly and the work was remote.

[37] I also note, by her own evidence, Ms Harris had not decided to end all of her arrangements with Ms Harris until part way through the meeting on 13 June. For those reasons I find Ms Keane's actions in walking off did not amount to a resignation.

Was the dismissal justified?

[38] Despite the meeting on 13 June being a positive step for an employer to have taken, so they could finally discuss matters, Ms Keane was handed a termination letter part way through that meeting. This letter was dated 9 June, the day Ms Keane walked off from the earlier meeting about the garage which raises the issue of pre-determination. It is well established that employees are entitled to expect a fair and reasonable process when they are dismissed. Predetermination results in unfairness to employees and is more than a minor defect in the process a fair and reasonable employer can be expected to follow.

[39] Ms Harris also said she wanted Ms Keane to remain working for her other businesses and relies on a text message she sent to Kim (about Ms Keane) after Ms Keane walked off on 9 June as evidence of that. However, she explained the second

² *Urban Décor Ltd v Yu* [2022] NZEmpC 56 and *Mikes Transport Warehouse v Vermuelen* [2021] NZEmpC 197.

termination letter signed by her was a result of how the meeting on 13 June went. At some point during that meeting Ms Harris reached the conclusion she could not work with Ms Keane any longer and verbally informed Ms Keane of this.

[40] It was evident from the transcript that two were talking past each other with Ms Harris wanting to see Ms Keane demonstrate an ability to follow instructions and listen and Ms Keane wanting to know why there were changes because no issues had been raised with her. Ms Keane felt like she had done something wrong. They both became entrenched in their positions.

[41] The net result of that was Ms Harris decided to end any residual arrangements she went into the meeting thinking she and Ms Keane could continue with. After the meeting ended Ms Harris emailed the second termination letter, signed by Ms Harris and this time dated 13 June to formally bring that into effect.

[42] The fact the first termination letter pre-dated the meeting to discuss the issues suggests that Ms Keane's dismissal was pre-determined. I note it is not in dispute Ms Harris thought she had a contracting arrangement with Ms Keane but nonetheless the fair and reasonable test in s103A of the Act is what the Authority must apply.

[43] The test in s 103A of the Act means GNZ's actions have fallen short of what a fair and reasonable employer could have been expected to have done in all the circumstances. There were concerns about Ms Keane and these were not raised with her. Instead, Ms Harris took steps to address the issues by finding solutions without alerting Ms Keane and therefore denying her the opportunity to respond to the concerns and have any response taken into account before Ms Harris made decisions about what to do. Ms Harris' ultimate solution was to store the products in her garage and change Ms Keane's geographical area of work so those engaged in the interpersonal disputes did not have to come in contact with each other.

[44] Because the issues with Ms Keane's conduct were not raised with her, no consultation occurred before changes were made to how and where Ms Keane worked in order to address those issues, and the decision to terminate was likely made before the meeting to discuss all these issues, Ms Keane has established a personal grievance for unjustified dismissal.

Remedies

[45] Ms Keane had been successful in her claim for unjustified dismissal and is entitled to an assessment of remedies for her personal grievance.

Lost wages

[46] The Act permits reimbursement to the employee of a sum equal to the whole or any part of wages or other money lost by the employee because of the grievance. Ms Keane seeks lost wages for three months from the date of dismissal on 13 June, accumulated at the rate of her average weekly pay. Evidence of attempts to find work were provided. I accept that reimbursement is appropriate in circumstances where there has been an unjustified dismissal. Ms Keane is entitled to three months lost wages and GNZ will be ordered to pay Ms Keane a sum equal to her lost remuneration or to three months' ordinary time remuneration.

[47] Leave is reserved to return to the Authority if the parties cannot agree on the calculation of lost wages.

Compensation

[48] Ms Keane seeks \$20,000.00 as compensation for humiliation, loss of dignity and injury to feelings caused by the grievance. I accept her evidence that her partner and her friend were so worried about her health because of changes in her behaviour after her dismissal that they encouraged her to seek medical advice and treatment. She gave honest evidence about seeking assistance and the advice and treatment she received.

[49] GNZ submitted the underlying health condition could not be attributed to the actions of her employer, however, Ms Keane's evidence about the need for the increase in medication satisfies me there was a link between her grievance and her health status after termination.³

[50] I note also her evidence about the shock of being terminated so abruptly. From her perspective, she thought things would calm down and they would be able to discuss and move on. The reality was things were going on behind the scenes and not being discussed so I accept the termination was abrupt from Ms Keane's perspective and this

³ *Keighran v Kensington Tavern Ltd* [2024] NZEmpC 28 at [41].

combination of the suddenness and not being told of the underlying concerns has caused humiliation and loss of dignity.

[51] Given my findings above, considering the distress experienced, the termination which flowed on from the decision not to address concerns about conduct with Ms Keane directly and the general range of awards in similar cases, I consider an appropriate award for compensation under s 123(1)(c)(i) of the Act to be \$20,000.00.

Contribution

[52] Under s 124 of the Act the Authority must consider whether any remedies awarded should be reduced to the extent to which the actions of the worker contributed to the situation giving rise to the personal grievance. I would need to be satisfied that Ms Keane's actions contributed to the situation that gave rise to the personal grievance and those actions "require" a reduction in the remedies that would have otherwise been awarded.⁴

[53] The primary considerations when determining whether a particular action should result in a reduction for contribution are causation and proportionality.⁵

[54] In this case strong submissions were made on behalf of GNZ that Ms Keane had contributed to the situation she found herself in. The particular conduct GNZ relies on is as follows:

- A WhatsApp exchange on 8 May about why Ms Keane believed she deserved a greater share of a bonus that was to be distributed between three people;
- Ms Keane's own awareness that she had alienated another team member;
- The argument over WhatsApp about attending the seafood factory; and
- Ms Keane's conduct at the meetings on 9 and 13 June, including walking off from the first meeting and recording the second meeting without telling Ms Harris until part way through the meeting.

[55] There are two aspects of Ms Keane's conduct that I consider to be examples of behaviour that may have contributed to the situation. In general, while Ms Keane's enthusiasm for the job was initially welcomed by Ms Harris, when it became

⁴ Employment Relations Act 2000, s 124.

⁵ *Macadam v Port Nelson (No 2)*[1993] 1 ERNZ 300 at 304-306.

overbearing for others, Ms Harris' requests for Ms Keane to slow down and Ms Keane's resistance to such requests were evident.

[56] The first incident was the WhatsApp discussion about a bonus which demonstrated Ms Keane's ability to speak up should she think something unfair to have occurred. However, once Ms Harris had explained in numerous ways why she was sticking to her original decision (because that was what had been agreed with the three people receiving the bonus), there was a point it was reasonable for Ms Keane to accept that position, despite any perceived inequity. This is particularly so given how early on it was in the employment relationship.

[57] Secondly, after the argument over WhatsApp about Ms Keane attending the factory ended with Ms Harris asking to meet in 15 minutes with Ms Keane so they could make a plan, Ms Keane declined that opportunity. Instead, she went to the meeting at Ms Harris' house to clear out the garage and by her own evidence said she used this as an opportunity to discuss the previous argument which quickly became volatile. Both said they found what transpired to be intimidating and caused them to be upset. That meeting ended with Ms Keane walking out.

[58] I consider Ms Keane has contributed at least partially to the issues that arose and that caused matters to escalate with Ms Harris. By May Ms Keane's own WhatsApp message demonstrated awareness that another team member was not talking to her. Ms Keane's evidence was that she was being micromanaged and this was unreasonable, however, in the context of an employment relationship particularly at the beginning, this was likely reasonable.

[59] Ms Keane's conduct in its totality including the WhatsApp messages and the walking off demonstrate Ms Keane's forthright and unwavering approach to any issue that arose from a very early stage in the relationship. While the employer had an obligation to raise issues once they became a concern, I consider Ms Keane's approach to resolving differences with her employer to have contributed to the situation she found herself in. Accordingly a reduction in remedies by 20 per-cent is appropriate.⁶

[60] With regard to recording the meeting, following the guidance in *Henderson Travels Limited v Kaur*,⁷ this was unlikely to be blameworthy conduct in the

⁶ *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136.

⁷ *Henderson Travels Limited v Kaur* [2023] NZEmpC 181 at [27] – [48].

circumstances and the impact lessened by the fact Ms Keane did in fact tell Ms Harris she was recording their discussion during the meeting. I note that Ms Harris continued the meeting for some time after being informed it was being recorded when she had the option of bringing the meeting to a close at that point.

Orders

[61] Genuine NZ Limited is ordered to pay Tania Keane:

- (a) Three months lost wages in accordance with s 128(2) of the Act; and
- (b) Compensation in the amount of \$16,000.00⁸ under s 123(1)(c)(i) of the Act as compensation for humiliation, loss of dignity and injury to feelings because of the unjustified dismissal.

Costs

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

[63] If they are not able to do so and an Authority determination on costs is needed Ms Keane may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum GNZ Limited would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[64] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁹

Sarah Kennedy-Martin
Member of the Employment Relations Authority

⁸ \$20,000.00 less 20 per-cent.

⁹ [Practice Direction of the Employment Relations Authority](https://www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf)
<https://www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf> (era.govt.nz)