

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2021] NZERA 510  
3119080

BETWEEN            AMIT KUMAR  
Applicant

AND                    HOSPITALITY SERVICES  
LIMITED  
Respondent

Member of Authority:    Trish MacKinnon

Representatives:        Phillip Drummond, counsel for the Applicant  
Andrew Scott-Howman, counsel for the Respondent

Investigation Meeting:    On the papers

Submissions [and further    19 April 2021 from the Applicant  
Information] Received:    9 April and 12 May 2021 from the Respondent

Date of Determination:    17 November 2021

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     Amit Kumar was employed as a Chef De Partie at the Copthorne Hotel in Palmerston North when, in April 2020, he was notified by his employer, Hospitality Services Limited (HSL), that his position was disestablished. Mr Kumar brings claims including unjustifiable dismissal and unjustifiable disadvantage to the Authority for determination. He seeks financial remedies, penalties and costs.

[2]     HSL rejects Mr Kumar's claims and says his position was disestablished for redundancy related to the effects of COVID-19 on its business, including the Copthorne Hotel, Palmerston North.

[3] HSL says Mr Kumar's personal grievance was raised out of time and, as Mr Kumar has not sought leave from the Authority to have his grievance heard out of time, his claims should be dismissed.

[4] In the course of a telephone conference in March 2021 it was agreed the preliminary matter of whether a grievance had been raised in time would be determined on the papers by submissions from the parties. An issue Mr Kumar raised over the length of the notice period to which he was entitled would also be determined on the papers.

[5] This determination has been issued outside the timeframe set out at s 174D(2) of the Employment Relations Act 2000 (the Act) in circumstances the Chief of the Authority has decided, as he is permitted by s 174D(3) to do, are exceptional.

### **Relevant Law**

[6] Section 114(1) of the Act provides that a personal grievance must be raised with the employer within a period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of the period.

[7] The grievance is raised with the employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.<sup>1</sup>

### **Relevant dates**

[8] Mr Kumar commenced his employment with HSL on 20 January 2006. He was employed on an individual employment agreement (IEA), the terms and conditions of which, as at April 2020, guaranteed him a minimum of 30 hours employment per week.

[9] On 11 April 2020 Mr Kumar received an emailed letter from his employer regarding a review it had undertaken of the structure of each department of the business. The letter notified Mr Kumar of the proposal to disestablish his position and end his employment by reason of

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<sup>1</sup> s 114(2) of the Act.

redundancy. Mr Kumar was asked to respond with feedback and views on the proposal by midday on 15 April 2020.

[10] Mr Kumar provided his feedback shortly before the deadline, while protesting the short timeframe for consultation. He received confirmation of the disestablishment of his position by letter the same day, 15 April 2020.

### **The termination letter**

[11] HSL's letter of 15 April 2020 served as notice to Mr Kumar that his employment with HSL would terminate by way of redundancy in accordance with the provisions of his IEA. His redundancy notice period would commence as of that day, 15 April 2020. That is the date HSL submits is the date of Mr Kumar's dismissal and the date from which the 90 day timeframe for raising a personal grievance began.

[12] HSL's letter of 15 April 2020 included the following information to Mr Kumar:

This means that **you are employed up until Wednesday 24 June 2020**. If the hotel is open you are expected to come to work up until Wednesday 24 June 2020. After this time please return your uniform and company property and any leave entitlements will be paid to you in your final pay. (highlighting added)

[13] Under the heading *Will I have to work my notice period?*, it stated:

Under normal circumstances, employees are required to work during their redundancy notice period. However due to the country being in Covid-19 Alert Level 4, your hotel is currently closed and you are unable to work, but you are being paid. **Therefore you will not be required to come to work until the hotel is open. At that point you will be expected to be available to work.**

[14] Under the heading *Outstanding leave entitlements* the letter advised Mr Kumar:

On your next pay after termination date, you will receive payment of any accrued annual leave entitlements including alternative days.

[15] Further down in the letter under the heading *Termination of Employment* it was stated:

**Until the end of your shift on the termination date, you will remain an employee** of the company. As such, you are legally bound by a duty of good faith and the Code of Conduct, which you have signed. This involves an obligation not to do or say anything which may harm the reputation of the company. (highlighting added)

[16] In an appendix to the letter, which contained the feedback HSL had received from employees and its responses to that feedback, the following information was provided:

3 **When will the changes be effective from?**

a. Your last day of employment will be Wednesday 24 June 2020.

6 **Will my redundancy payment be paid out to me in a lump sum or weekly?**

As advised in the letter, for the duration of your notice period you are still employed by HSL and you may be required to work. Therefore you will continue to be paid weekly.

### **Raising the personal grievance and HSL's response**

[17] Mr Kumar raised a personal grievance for unjustified dismissal on 23 July 2020 through the Manawatu Community Law Centre. The letter stated HSL had "dismissed Mr Kumar unjustifiably on 15 April 2020". It referred to the deficiencies in HSL's process that resulted in the dismissal being unjustifiable. The letter stated at least twice that Mr Kumar's employment ended on 24 June 2020. Reinstatement and lost wages were sought from that date as well as compensation for hurt and humiliation.

[18] HSL responded to the issues raised in the letter of grievance but also notified its view that Mr Kumar's grievance had been raised out of time. It said it would oppose any application for leave from the Authority to file a grievance out of the statutory timeframe.

### **Termination and redundancy provisions**

[19] Mr Kumar's IEA specified two weeks' notice of termination of employment in writing other than for dismissal without notice which would apply in the case of serious misconduct. There was provision for the company to elect to pay out the notice period in lieu of it being worked. Under the redundancy provisions of Mr Kumar's individual employment agreement:

At any time the Company may implement redundancies for genuine business reasons.

Redundancy means a situation where your employment is terminated by the Company, the termination being attributable, wholly or mainly, to the fact that the position filled by you is, or will become superfluous to the needs of the company including in situations where the redundancy arises due to the contracting out of the business.

If redundancies are required, the Company reserves the right to select employees for redundancy on the basis that it retains employees who by reason of skills and attributes are, in the Company's opinion, necessary for continuing operations.

Unless otherwise specified in your appointment letter, if your employment is terminated because your position is redundant you will be given two weeks' notice in writing, or pay in lieu of such notice.

Unless specified in your appointment letter, no compensation is payable in the event of redundancy. However, if you have no entitlement to redundancy compensation, you are entitled to further notice as follows:

- After one year's service the notice period will be increased to a maximum of four weeks;
- After two years' service the notice period will be increased to a maximum of six weeks;
- After five years' service the notice period will be increased to a maximum of ten weeks.

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### **When did the 90 days commence?**

[20] Mr Kumar, through counsel, submits the 90 day limitation period for raising his personal grievance began on 24 June 2020, the day his employer had specified as the last day of his employment.

[21] HSL submits the 90 days commenced on 15 April 2020, the day Mr Kumar was given notice that his employment would terminate on 24 June 2020. Its reasoning, briefly summarised, is that the matters Mr Kumar alleged to amount to a personal grievance occurred on and before 15 April 2020.

[22] I do not accept that submission. If Mr Kumar had been summarily dismissed on 15 April 2020, for example, for serious misconduct, which he was not, the 90 days would have commenced from that day. Mr Kumar was dismissed on notice for redundancy and was expected to be available for work, if the hotel were able to open to guests during that notice period.

[23] He remained on the payroll until 24 June 2020 and was indeed required to work, according to HSL's submissions, on one occasion during his notice period. HSL's letter providing Mr Kumar with notice of the termination of his employment specifically advised him that he was employed up until 24 June 2020 and reminded him that he was legally bound, up until the end of his shift on the termination date, by a duty of good faith and by the employer's Code of Conduct.

[24] The Employment Court held in *New Zealand Automobile Association v McKay* that, where an employee has been dismissed on notice, he or she can only submit an unjustified

disadvantage grievance during that period of notice.<sup>2</sup> This is because the dismissal does not actually occur until the period of notice expires. The Court cited an earlier case *Gibson v GFW Agri-Products Ltd* [1994] 2 ERNZ 309 at 314 where Goddard CJ had found:

"*Poverty Bay Electric Power Board v Atkinson* [1992] 3 ERNZ 413 ...clearly holds that a dismissal occurs when the employment actually ceases and not on the day when an employer gives notice that it will cease. There is a long line of cases to that effect, one being *Wellington Road Transport etc IUOW v Fletcher Construction Ltd* [1983] ACJ 653, 644 cited by Travis J in *Batey v Board of trustees of St Michael's School* [1993] 2ERNZ 851,858."

Goddard CJ went on to find, at p315:

" As is always suggested by *Poverty Bay Electric Power Board v Atkinson*,the giving of a notice is not always *permanent and terminal*. If the employee protests, there is often a possibility that the employer may relent and change its mind and withdraw the notice, particularly if the notice given is objected to as being shorter than that to which the employee is entitled, but also in other situations. That is one of many reasons for saying that the employment does not end when the notice is given, but only when it has run its course."

[25] *Gibson, McKay and Atkinson* were decided under earlier legislation but continue to be relevant on the matter of when employment ceases. The Employment Court found, in *Ceres New Zealand LLC v DJK*, that DJK's termination of employment occurred at the expiry of her notice period.<sup>3</sup> She, like Mr Kumar, had been made redundant. Unlike Mr Kumar, she had been informed that her last day of employment was the day she received notice of the termination of that employment. The Chief Judge found, notwithstanding DJK had been paid in lieu of notice, that her employment ended on the date on which her notice period came to an end.

[26] Having considered the parties' submissions and the relevant case law, I find that Mr Kumar's employment ended on 24 June 2020 at the expiry of his notice period. That was the date from which the 90 day statutory timeframe for raising a personal grievance for unjustifiable dismissal commenced. He raised the grievance within that timeframe.

### **Notice period**

[27] Mr Kumar claims he was entitled to be paid a total of 12 weeks' notice under the redundancy provisions of his IEA rather than the 10 weeks' notice he was paid. He submits

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<sup>2</sup> [1996] 2 ERNZ 622.

<sup>3</sup> [2020] NZEmpC 153.

HSL is wrong in its claim that the notice period is restricted to 10 weeks under those redundancy provisions.

[28] Mr Kumar's submission is that the first part of the redundancy notice provision, which provides two weeks' notice or pay in lieu of notice, is applicable to all employees who are made redundant, unless otherwise specified in their appointment letters. The second part of the redundancy provisions provides for "further notice" depending on the length of the employee's service. Mr Kumar submits that "further notice" refers to notice that is additional to, and over and above, the two weeks to which all employees made redundant are entitled. In his submission, that is the ordinary and natural meaning of "further notice".

[29] If the "further notice" was intended to exclude the two weeks' notice provided for in the first part of the redundancy provision, it would be reasonable to expect that to be stated, in Mr Kumar's submission. He perceives the lack of any such exclusionary statement as support for his view that the "further notice" was intended to apply in addition to the two weeks' notice from the first part of the provision.

[30] In Mr Kumar's view, if the first part of the redundancy provision was intended to be restricted to those employees not covered by the second part of the provision, it would have stated that two weeks' notice applies only to employees with less than one year's service. That, in his submission, is the effect of the interpretation HSL is seeking to apply to that part of the notice provision.

[31] HSL submits Mr Kumar's interpretation is incorrect and there is no basis for concluding the 2 weeks' notice from the first part of the provision and the 10 weeks' notice, which was based on the length of Mr Kumar's service, were intended to be cumulative. In HSL's submission, the purpose of the provision is to provide additional notice, up to a maximum, to employees with long service. This is in place of redundancy compensation, as opposed to notice plus compensation.

[32] HSL says the provision states a maximum notice entitlement of 10 weeks, which is what Mr Kumar was entitled to receive, and did receive.

[33] The Supreme Court in *Affco New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Incorporated*<sup>4</sup> confirmed that the essential approach to the interpretation

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<sup>4</sup> [2017] NZSC 135.

of employment contracts is that which it described in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*:

[60] ... the proper approach is an objective one, the aim being to ascertain “the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract”. This objective meaning is taken to be that which the parties intended. While there is no conceptual limit on what can be regarded as “background”, it has to be background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole and any relevant background informs meaning.<sup>5</sup>

[34] The Supreme Court also recently observed that:

Contractual interpretation invites a common sense approach to the task of assessing what the parties intended by the words, objectively assessed.<sup>6</sup>

[35] In this instance, the IEA appears to be plainly written. The redundancy provision of Mr Kumar's IEA provides that, unless his appointment letter otherwise specifies, he will receive two weeks' notice in writing or pay in lieu. His appointment letter did not otherwise specify, so the two week notice period is applicable.

[36] The provision then states that, unless specified in his appointment letter, Mr Kumar has no entitlement to redundancy compensation in the event of redundancy. However, if he has no entitlement to redundancy compensation, which Mr Kumar does not, he is entitled to "further notice".

[37] "Further" notice is additional or supplementary notice, the amount of which is dependent on length of service up to five years. Mr Kumar had more than five years' service, therefore his notice period was increased to a maximum of 10 weeks. I do not accept that this means Mr Kumar was entitled to two weeks' notice under the first part of the redundancy provision, and a further 10 weeks' notice under the second part of the provision. That is applying a strained interpretation that cannot be sustained.

[38] The plain meaning of the words "after five years' service the notice period will be increased to a maximum of 10 weeks" is that the two weeks' notice applicable under the first

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<sup>5</sup> [2014] NZSC 147 at [60].

<sup>6</sup> 127 *Hobson Street Limited v Honey Bees Preschool Limited* [2020] NZSC 53 at [94].

part of the provision will be increased to 10 weeks under the second part. I agree with HSL that the provisions are not cumulative.

[39] I accept HSL's submission that Mr Kumar was entitled to receive, and was paid, 10 weeks' notice under his IEA.

### **Summary of findings**

[40] The commencement date for the 90 day statutory timeframe for raising a personal grievance was 24 June 2020. Mr Kumar's grievance was raised in time.

[41] Mr Kumar was entitled to receive, and was paid, 10 weeks' notice. No further period of notice is owing.

### **Costs**

[42] Costs are reserved and will be considered after the substantive hearing of Mr Kumar's claims.

[43] The Authority will contact the parties shortly about the progression of this matter.

Trish MacKinnon  
Member of the Employment Relations Authority