IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI Ā TARA ROHE

[2024] NZERA 694
3256379

	BETWEEN	LOISI LAUKAU Applicant
	AND	KJ RANDHAWA LIMITED Respondent

Member of Authority:	Shane Kinley
Representatives:	John Wood, advocate for the Applicant Julia Kaur-Randhawa, for the Respondent
Investigation Meeting:	1 August 2024 in New Plymouth
Submissions and further information:	Up to 10 September 2024 from the Applicant and Respondent
Determination:	20 November 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Loisi Laukau was employed by KJ Randhawa Limited (KJR) from March 2023 in KJR's bakery, café and gelato shop until her employment ended in September 2023 following a restructuring and redundancy process.

[2] Ms Laukau raises claims her employment agreement did not comply with the availability provision requirements in s 67D(2) of the Employment Relations Act 2000 (the Act), KJR did not comply with cl 8.2 of Ms Laukau's employment agreement regarding agreeing to roster arrangements and she was unjustifiably disadvantaged or dismissed by KJR in relation to the restructuring process.

[3] KJR denies Ms Laukau's claims including saying its restructuring process was fair and reasonable.

The Authority's investigation

[4] For the Authority's investigation written witness statements were lodged by Ms Laukau, Akanesi Havea (Ms Laukau's mother) and Munisha Nadan (another former employee of KJR), and for KJR by Mrs Kaur-Randhawa, one of its directors and shareholders. Ms Laukau, Mrs Havea and Mrs Kaur-Randhawa answered questions, under oath or affirmation, from me and from the representatives. I excused Ms Nadan from appearing at the investigation meeting as I did not consider her evidence would assist in determining this matter. Mrs Kaur-Randhawa was represented at the investigation meeting by Ian Moore.[1]

[5] At the investigation meeting I timetabled for evidence discussed during the investigation meeting to be provided and identified a number of points I considered it would be helpful for submissions to address. Mr Wood and Mrs Kaur-Randhawa provided the directed information and written submissions following the investigation meeting.

[6] As permitted by s 174E of 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

[7] The issues initially identified as requiring investigation and determination were:

(a) Did Ms Laukau's employment agreement comply with the availability provision requirements in s 67D(2) of Act?

(b) Did KJR comply with cl 8.2 of Ms Laukau's employment agreement regarding agreeing to roster arrangements?

(c) Did KJR breach s 19 of the Holidays Act 2003 (HA2003) and unjustifiably disadvantage Ms Laukau by requiring she take annual holidays?

[1] KJR's Statement in reply was lodged and served by its then counsel David Browne, who also represented it at a case management conference on 7 March 2024. Mr Moore acted as KJR's representative at the investigation meeting. Mrs Kaur-Randhawa then provided written submissions on behalf of KJR. In the intituling for this determination I have identified Mrs Kaur-Randhawa as KJR's representative.

(d) Was Ms Laukau unjustifiably disadvantaged or dismissed by KJR in relation to the restructuring process, considering alleged failures to:

(i) provide information as required under s 4(1A)(c)(i) of the Act;

(ii) be constructive in maintaining a productive employment relationship; and

(iii) consider redeployment?

(e) If KJR's actions were not justified (in respect of disadvantage or dismissal) what remedies should be awarded, considering:

(iv) Lost wages under s 123(1)(b) of the Act (subject to evidence of reasonable endeavours to mitigate Ms Laukau's losses); and

(v) Compensation under s123(1)(c)(i) of the Act?

(f) If KJR failed to comply with s 67D(2) or cl 8.2 of Ms Laukau's employment or KJR failed to pay Ms Laukau agreed minimum hours, should penalties be ordered against KJR under s 65(4) or s 134(1) of the Act and, if so, should any part of any penalties be ordered to be paid to Ms Laukau?

(g) Should either party contribute to the costs of the other party?

[8] At the investigation meeting Mr Wood confirmed there were no live claims related to underpayment of wages, directions to take annual holidays or in relation to whether breaks were provided. The issue of whether breaks had been provided was not included in the Statement of problem, but was a feature of witness statements. Those claims are not addressed further in this determination.

Did Ms Laukau's employment agreement comply with the availability provision requirements in s 67D(2) of Act?

Relevant law

[9] Sub-sections 67D(1) and (2) of Act are relevant to this issue and provide:

> **67D Availability provision**
> (1) In this section and section 67E, an availability provision means a provision in an employment agreement under which—
> (a) the employee's performance of work is conditional on the employer making work available to the employee; and
> (b) the employee is required to be available to accept any work that the employer makes available.
> (2) An availability provision may only—
> (a) be included in an employment agreement that specifies agreed hours of work and that includes guaranteed hours of work among those agreed hours; and
> (b) relate to a period for which an employee is required to be available that is in addition to those guaranteed hours of work. ...

[10] Ms Laukau's signed employment agreement included the following provisions in relation to hours of work:

> **4. HOURS OF WORK**
> 4.1 The business' normal span of hours of operation are outlined at **Item 6** of the Schedule [which stated Monday to Sunday, 24 hours a day].
> 4.2 You will be guaranteed and required to work 30 hours per week. Your hours and days of work shall be set by the Employer in advance in accordance with a mutually agreed roster. The Employer may offer you additional hours from time to time.

Ms Laukau's employment agreement did not contain an availability provision

[11] Ms Laukau said she was told she would be working Monday to Friday with shifts of a minimum of six hours, which initially occurred but later changed. Submissions referred to KJR's Employee Handbook and a provision on secondary employment, which were said in combination to have constrained Ms Laukau's ability to survive financially, and said the roster system provided only benefit to KJR. Ms Laukau was said to have been punished when seeking to exercise the flexibility of the roster system by being offered less hours than she was contracted for.

[12] Reference was made to the Court's judgment in *Stewart v AFFCO New Zealand Ltd*[2] which examined the requirement for an employee to be available for overtime and was said to be parallel to Ms Laukau's situation. Finally, if I was to find there was no availability provision, submissions said KJR had failed to meet contractual requirements to agree rosters and provide 30 hours per week of work.

[13] KJR said it operated a roster arrangement, with Mrs Kaur-Randhawa attempting to balance employee preferences in relation to hours and days of work, which could lead to rosters being revised multiple times each week. KJR did not understand its arrangements to be an availability provision and said on rostered days off workers were not required to be available and if asked to work, for example to cover sick leave, there was no requirement they do so.

[14] I do not consider the provisions of Ms Laukau's employment agreement referred to or how they were described as operating in practice amount to an availability provision as defined in s 67D(1) of the Act. Rather the evidence pointed towards a roster arrangement, which it appeared neither Ms Laukau or Mrs Kaur-Randhawa were fully satisfied with the operation of.

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[2] [2022] NZEmpC 200.

[15] The Court in *Stewart* was considering an employment agreement which included provisions stating:

> … the employee agrees to be available to work for the hours as outlined in this agreement and overtime as reasonably required by the employer … [and]
>
> … the employee accepts that s/he may be required to work extra hours both during the week and on weekends as required by the employer and agrees to work such extra hours as are required.

[16] While there is a similarity in this matter to the facts in *Stewart* in relation to Ms Laukau saying she could decline additional shifts when offered, I consider there are broader differences. I accept the evidence of Mrs Kaur-Randhawa there was no requirement to work extra shifts when requested. This was supported by Ms Laukau's witness statement and evidence at the investigation meeting where she referred to being able to advise Mrs Kaur-Randhawa of when she was not available, which would be reflected when the roster was set.

[17] Text messages were provided which supported Ms Laukau raising concerns about not being rostered her guaranteed 30 hours per week on at least three occasions, with Mrs Kaur-Randhawa responding each time. These messages support KJR's position there was a roster provision with discussion about what shifts would be worked rather than requirements for Ms Laukau to be available above guaranteed hours. Supporting this, a text message exchange on 22 July 2023 showed Mrs Kaur-Randhawa requested Ms Laukau work to cover another worker, which Ms Laukau politely declined.

[18] I find Ms Laukau's employment agreement did not contain an availability provision as defined in s 67D(1) of the Act. Consequently, penalties in relation to this claim are not considered.

Did KJR comply with Ms Laukau's employment agreement regarding agreeing to roster arrangements?

Relevant law

[19] Ms Laukau sought arrears of wages for KJR's failure to provide the contractually guaranteed hours of work. Actions for arrears are provided under s 131 of the Act:

> **131 Arrears**
> (1) Where—
> (a) there has been default in payment to an employee of any wages or other money payable by an employer to an employee under an employment agreement or a contract of apprenticeship; or

(b) any payments of any such wages or other money has been made at a rate lower than that legally payable,—

the whole or any part, as the case may require, of any such wages or other money may be recovered by the employee by action commenced in the prescribed manner in the Authority.

Insufficient evidence to support claim of roster arrangements not being agreed

[20] Ms Laukau said there was clear evidence from payslips of three weeks when she did not receive 30 hours per week, as required under cl 4.2 of her signed employment agreement, quoted at paragraph [10] above. KJR were said to have admitted to having not complied with the relevant provision of the employment agreement, with no attempts to negotiate a mutually agreed roster when Ms Laukau had said she was not available on a particular day.

[21] KJR's evidence was the roster for all staff was amended when posted in response to staff feedback until there was no further feedback when it was then agreed. Payslips showing less than 30 hours per week were said to be because Ms Laukau "chose to finish early rather than ask for extra things to make up her time". Reference was also made to Ms Laukau not working Sundays, only rarely working Saturdays and being unavailable on public holidays, when KJR really needed experienced people.

[22] In principle a failure by KJR to provide Ms Laukau with her guaranteed hours of work would entitle her to arrears for the underpayment. In this case, however, I am unclear from submissions precisely which weeks this claim related to.

[23] Payslips provided by KJR showed three weeks where hours paid were slightly less than 30 per week, being the week of 17 to 23 July 2023 when 29.25 hours were paid, the week of 24 to 30 July 2023 when 29.75 hours were paid and the week from 31 July to 6 August 2023 when 29.75 hours were paid.

[24] Ms Laukau wrote to KJR on 11 and 14 August 2023 raising a claim for underpaid wages for these weeks claiming she should have been paid for an extra 2.1 hours over those weeks, including five 10-minute breaks she said she had not taken.

[25] At the investigation meeting it was confirmed Ms Laukau was not proceeding with the claims in relation to underpayment of wages or whether breaks were provided.

[26] Text messages provided by Ms Laukau and KJR, and Ms Laukau's letters of 11 and 14 August 2023 suggest while Ms Laukau was rostered for less than 30 hours in the week of 17 to 23 July 2023, when she raised concerns the roster was adjusted to

provide for 30 hours of work. In the other two weeks Ms Laukau's letters suggest she was rostered to work 30 hours. To the extent her claim related to unpaid breaks, this claim appears to be one which was confirmed to have been withdrawn at the investigation meeting.

[27] To the extent these weeks are those claimed to be those where Ms Laukau did not receive 30 hours per week, I consider the evidence supports Ms Laukau being rostered for more than 30 hours each week. On a balance of probabilities I consider it is more likely than not the reason she was not paid for 30 hours is because she chose to finish work early on one or more days each week.

[28] I also considered text messages related to the roster for the week of 10 to 16 July 2023, where Ms Laukau raised concerns about being rostered for 22 hours only. In that case Mrs Kaur-Randhawa advised this was because Ms Laukau had taken Friday off, which was Matariki. Ms Laukau was paid for that day as an unworked public holiday, which meant she was paid for more than 30 hours that week.

[29] I find there is insufficient evidence to support Ms Laukau's claim KJR did not comply with her employment agreement regarding agreeing to roster arrangements or KJR failed to provide her contractually guaranteed hours of at least 30 hours each week. No remedies are due and penalties in relation to this claim are not considered.

Was Ms Laukau unjustifiably disadvantaged or dismissed by KJR in relation the restructuring process?

[30] This claim involved alleged failures to:

a. provide information as required under s 4(1A)(c)(i) of the Act;
b. be constructive in maintaining a productive employment relationship; and
c. consider redeployment?

Relevant law

[31] In considering a personal grievance for redundancy the Authority must apply the test for justification set out at s 103A of the Act. The Authority must assess the reasons given to the employee by the employer including the business reasons and decide, on an objective basis, whether the employer's actions were reasonable.

[32] The Court of Appeal said in *Grace Team Accounting Ltd v Brake* if an employer can show the redundancy was genuine, and notice and consultation requirements have been met, the s 103A test may well be satisfied:[3]

> [80] We consider that the appropriate approach to statutory interpretation in this case is the orthodox approach beginning with the words of the section and considering them in light of the purpose of the statute. When the words of s 103A are considered in light of the purposes of the statute set out in s 3 and the overarching duty of good faith provided for in s 4, we do not consider that the reference in s 103A to a "fair and reasonable employer" can properly be read down to mean "a genuine employer", in the sense used in *Hale* (an employer not using redundancy as a pretext for dismissing a disliked employee).
>
> [81] Given the explicit requirements for disclosure of information and consultation that now apply in redundancy situations, the reality is that the Employment Court will have before it the information provided by the employer to the employee justifying the redundancy. Whatever may have been the case in the pre-s 103A environment, the clear words of s 103A now require the Employment Court to determine on an objective basis whether the employer's actions and how it acted were what a reasonable employer would have done. That test has little in common with this Court's pronouncements in *Hale* and *Aoraki*.
>
> …
>
> [85] Having said that, however, we do not dismiss the importance of the Employment Court addressing the genuineness of a redundancy decision. If the decision to make an employee redundant is shown not to be genuine (where genuine means the decision is based on business requirements and not used as a pretext for dismissing a disliked employee), it is hard to see how it could be found to be what a fair and reasonable employer would or could do. The converse does not necessarily apply. But, if an employer can show the redundancy is genuine and that the notice and consultation requirements of s 4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s 103A test. In the end the focus of the Employment Court has to be on the objective standard of a fair and reasonable employer, so the subjective findings about what the particular employer has done in any case still have to be measured against the Employment Court's assessment of what a fair and reasonable employer would (or, now, could) have done in the circumstances.

[33] This case involved claims focussed on the duty of good faith in s 4 of the Act, which the Court of Appeal referred to at paragraph [80] of *Grace Team Accounting Ltd v Brake*, relevant provisions of which state:

> **4 Parties to employment relationship to deal with each other in good faith**
> (1) The parties to an employment relationship specified in subsection (2) —
> (a) must deal with each other in good faith; and …
> (1A) The duty of good faith in subsection (1) —
> (a) is wider in scope than the implied mutual obligations of trust and confidence; and

[3] [2014] NZCA 541.

> (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and
> (c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—
> (i) access to information, relevant to the continuation of the employees' employment, about the decision; and …

[34] A fair and reasonable employer is expected to comply with its statutory obligations which include the good faith obligations. Failure by an employer to comply with these obligations may fundamentally undermine its ability to justify a dismissal or other action "because a fair and reasonable employer will comply with the law".[4]

KJR has not provided sufficient evidence it adequately considered options which could have maintained Ms Laukau's employment

[35] Ms Laukau claimed there were two restructurings, the first on 27 July 2023 when KJR proposed a temporary reduction of hours which was "completely deficient in information to support any change". The second restructuring was said to be initiated on 15 August 2023 with multiple drivers including reduced sales, a move from a roster system to set days, and a desire to reduce wages for front of house. It was submitted "the ultimate driver of the consultation was whether the full time employees would work at least one week end [sic] day".

[36] Consultation was said to have been limited with no consultation on matters claimed to be based on business need, including whether all full time staff including Ms Laukau needed to work on a weekend day. KJR were said to have failed to be constructive in maintaining a productive employment relationship with Ms Laukau, to have failed to explore what appeared to be a difference in views and to have made no effort to redeploy Ms Laukau.

[37] Submissions for Ms Laukau concluded:

> … [KJR] had an obligation to offer Position 2 to [Ms Laukau]. Up until this point [Ms Laukau's] IEA allowed her to seek not to work some days (Saturdays). If the situation had changed a fair and reasonable employer would have informed [Ms Laukau] that the new shift pattern required her to work every Saturday, and that she was being offered such a role. We say that only once [Ms Laukau] had declined a clear and certain offer could a fair and reasonable employer look to terminate her.

[4] *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825 at [65].

[38] KJR said the temporary reduction in hours was not part of a restructuring, although it led to thinking about the restructuring proposal. KJR acknowledged taking legal advice during the restructuring process, including identifying business needs, and emphasised the benefits of fixed shifts. KJR said it took into account Ms Laukau's feedback but "were unable to go ahead with her ideas as it would solve it for her but for us would create a flow on effect throughout the rest of the team".

[39] KJR said Ms Laukau was clear in discussions she would not work Sundays and:

> … we told our point asked for feedback took into consideration and made a decision. … i had talked to her about it and from our meeting then relooking at the roster it was clear for me that i could not make it work and made the decision to go ahead with making a monday-friday position redundant. [sic]

[40] KJR's submissions concluded:

> she had made it very clear she would not accept working sunday, or less than 30 hours, i did not have a position to fit that. [sic]

[41] I consider it appropriate to focus on the restructuring proposal which commenced with KJR's letter to Ms Laukau of 15 August 2023. Given my findings in relation to the ending of Ms Laukau's employment, I do not need to determine whether the reduction in hours was a separate restructuring proposal.

[42] I accept KJR had genuine business reasons for putting forward its restructuring proposal on 15 August 2023 and specifically in proposing "to restructure and disestablish the current roster and shift methodology or work arrangements and replace that system with set days and hours of work". Mrs Kaur-Randhawa's evidence was clear she needed to spend a significant amount of time each week adjusting the roster system. Frustrations with the roster system were shared by Ms Laukau, who had said in a text message on 16 July 2023, when querying shifts offered, "I have asked a number of times for set days".

[43] This appears to be a situation where the parties should then have been able to focus on the implementation of the restructuring proposal or what shifts Ms Laukau would be offered. I consider this is close to or analogous with moving to considering an offer to redeploy Ms Laukau into the new "system with set days and hours of work" which KJR were proposing.

[44] The Court in *New Zealand Steel Ltd v Haddad* said:[5]

> The proper approach for employers when considering redeployment is that, when considering whether to dismiss an employee after their position has been made redundant, an employer must consider whether to redeploy the employee. When considering redeployment, the employer must comply with the good faith obligations in s 4 and, in particular, must consult with the employee in accordance with s 4(1A)(c). Finally, when deciding whether to redeploy the employee, the employer must be active and constructive in maintaining the employment relationship in accordance with s 4(1A)(b) including being responsive and communicative.

[45] Mrs Kaur-Randhawa met with Ms Laukau and Mrs Akanesi to discuss the restructuring proposal on 19 August 2023. Ms Laukau said she asked questions about the proposed new set days of work and acknowledged she asked if there could be changes to the proposed roster, including a possibility of working only alternate Saturdays, and that she did not want to work Sundays. Ms Laukau and Mrs Akanesi both said Mrs Kaur-Randhawa was to consider this matter further.

[46] Mrs Kaur-Randhawa's evidence accepted she was to consider the questions raised and said she went away and reviewed the roster, but was not able to accommodate what she understood Ms Laukau's preferences to be.

[47] Ms Laukau was then off for a period of agreed leave, and next met with Mrs Kaur-Randhawa on 7 September 2023. This meeting was recorded by Ms Laukau without Mrs Kaur-Randhawa's knowledge and a transcript provided, which was accepted by Mrs Kaur-Randhawa as being accurate. I have reviewed the recording and agree the transcript is accurate.

[48] At this meeting Mrs Kaur-Randhawa presented KJR's decisions on the restructuring proposal. This included advising Ms Laukau, having considered different options for set days and hours, and Ms Laukau's preferences, "I just don't think we got a position that allows that. Umm … so, we are going to have to make that position redundant". There was some discussion of changes to the roster including Ms Laukau asking if she was being made redundant because she had asked for alternating Saturdays off and indicating she had expected further discussion about options. Ms Laukau also indicated she had expected there to be further discussions after KJR had considered feedback.

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[5] [2023] NZEmpC 57 at [84].

[49] Mrs Kaur-Randhawa gave Ms Laukau a letter during this meeting which confirmed the restructuring was proceeding and included the comment "Unless we are wrong you don't want either set one or set two and your preference is for another set not offered to any staff which would allow you Saturday off work … We appreciate your input however we are unable to accommodate your request for Saturdays off". The letter gave three weeks' notice Ms Laukau's employment would end as a result of redundancy.

[50] I consider KJR has conflated the decision on whether to restructure, which was justifiable, with a decision to make Ms Laukau redundant without considering adequately whether to specifically offer her one of the options within the new system of set days and hours. When questioned about this at the investigation meeting Mrs Kaur-Randhawa said if Ms Laukau had of come back and said she could take one of the options in the new system of set days and hours, this would have been fine, however she assumed Ms Laukau was not willing to do so based on her preference for 30 hours per week and no weekend work. During the meeting with Ms Laukau on 7 September 2023 Mrs Kaur-Randhawa had been clear KJR was not willing to make options without weekend work available.

[51] Ms Laukau's advocate raised personal grievances on her behalf the following day, including indicating she considered she had been unjustifiably dismissed. This letter sought mediation and indicated proceedings would follow in the Authority if mediation was not agreed to.

[52] Regrettably this was a situation where Ms Laukau and Mrs Kaur-Randhawa do not appear to have had a discussion which could have clarified whether Ms Laukau was willing to accept one of the options within the new system of set days and hours. If Ms Laukau had of been willing to do so and all KJR required was she indicate this, then this matter could have been resolved at this stage. I consider KJR were the party which should have clarified this situation and it failed to do so.

[53] KJR's counsel responded to Ms Laukau's grievances on 22 September 2023 including saying:

> The set days and hours requested were offered to Ms Laukau during consultation over the proposed restructure, a process that was prolonged due to her absence. A proposed timetable was provided to all staff for comment. Ms Laukau's comments were carefully considered and unfortunately no combination of set days and hours was acceptable to her. With the long-

> awaited renovation of the shop nearing completion a further question raised in the restructure proposal needed to be addressed.
>
> The question was this: Does Piccolo Morso Café need all the staff it had prior to the shop refit? The improved workflows achieved by the rebuild meant the answer was no. Ms Laukau's inability to reasonably locate a spot within the proposed new timetable that suited her, and the reduction of staff realised by the expensive overhaul of the shop improving workflows and customer experience, brought employment to an end.

[54] I find Ms Laukau was not offered an option within KJR's new system of set days and hours. The letter from KJR which Mrs Kaur-Randhawa gave Ms Laukau, referred to at paragraph [49] above, stopped short of making such an offer. Having reviewed the recording and transcript of the meeting on 7 September 2023 I also do not consider Mrs Kaur-Randhawa made such an offer during the meeting. I find by failing to do so, KJR failed to meet its duty of good faith under s 4(1A)(b) of the Act, which required it "to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative".

[55] I do not consider KJR has met its obligations to offer Ms Laukau a place, or to consider redeployment of Ms Laukau, within the new system of set days and hours KJR had decided to implement. While KJR was a relatively small business, it was being professionally advised during restructuring process and in responding to Ms Laukau's grievances. I do not consider KJR's actions were what a fair and reasonable employer would have done in the circumstances.

[56] Having reached this conclusion, I do not need to make a determination about whether KJR failed to provide information as required under s 4(1A)(c)(i) of the Act or whether Ms Laukau was unjustifiably disadvantaged by KJR's actions.

Ms Laukau was unjustifiably dismissed by KJR

[57] For the above reasons I find Ms Laukau was unjustifiably dismissed by KJR.

What remedies should be awarded to Ms Laukau in relation to her unjustified dismissal?

[58] Having determined Ms Laukau was unjustifiably dismissed, I need to consider what remedies should follow. Ms Laukau sought three months' lost wages under s 123(1)(b) of the Act, less income earned during that period and compensation of $20,000 for hurt and humiliation under s 123(1)(c)(i) of the Act.

[59] Ms Laukau's evidence was she was out of work for nine weeks then found another role which paid $320 less per week than her role at KJR. Lost wages were claimed of $8,300.[6]

[60] Ms Laukau's confidence was said to have been severely impacted by the termination of her employment. Ms Laukau said she was surprised and embarrassed by her redundancy, her anxiety went up and she was depressed and ashamed. She said she applied for other jobs online and by dropping CVs to prospective employers, which led to her securing part-time work in December 2023. At the time of the investigation meeting, she had recently obtained a new job.

[61] KJR said it offered Ms Laukau casual work, which she could have taken up and would not have caused embarrassment as her redundancy was not personal and was not about performance. KJR also said no compensation should be payable as Ms Laukau's employment agreement said no compensation was payable in a redundancy situation.

[62] I accept the calculation of lost wages provided on behalf of Ms Laukau and order KJR to pay her $8,300 in lost wages under s 123(1)(b) of the Act. I do not accept KJR's submission Ms Laukau could have mitigated her losses by accepting casual work with it. In the circumstances where she had been made redundant by KJR, I do not consider it reasonable to expect her to then accept casual work with KJR.

[63] I also consider Ms Laukau is entitled to compensation under s 123(1)(c)(i), which I fix at $20,000 taking into account other comparable cases in the Authority and Court, subject to consideration of contribution. In my assessment Ms Laukau provided evidence of moderate impacts on her of her employment with KJR ending. I do not accept KJR's submissions, which appear to confuse compensation for hurt and humiliation under s 123(1)(c)(i) of the Act with contractual compensation for redundancy. These are different things.

Should remedies be reduced (under s 124 of the Act) for blameworthy conduct by Ms Laukau that contributed to the situation giving rise to her grievance?

[64] I am required to consider if remedies should be reduced (under s 124 of the Act) for blameworthy conduct by Ms Laukau that contributed to the situation giving rise to her grievance. This point was not addressed in submissions.

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[6] Being nine weeks at $780 per week plus four weeks at $320 per week.

[65] Ms Laukau was dismissed for redundancy. Redundancy is generally considered to be a no-fault situation to which an employee made redundant cannot have contributed. While the Court has found contribution can arise during a redundancy situation, this will depend on the behaviour of the employee and whether it is blameworthy.[7] In this matter I do not consider Ms Laukau's actions were blameworthy and no reduction in remedies is ordered.

Summary of outcome

[66] I have found:

a. Ms Laukau's employment agreement did not contain an availability provision as defined in s 67D(1) of the Act;
b. there is insufficient evidence to support Ms Laukau's claim KJR did not comply with her employment agreement regarding agreeing to roster arrangements or KJR failed to provide her contractually guaranteed hours of at least 30 hours each week;
c. KJR had genuine business reasons for its proposal "to restructure and disestablish the current roster and shift methodology or work arrangements and replace that system with set days and hours of work";
d. Ms Laukau was not offered an option within KJR's new system of set days and hours;
e. KJR failed to meet its duty of good faith under s 4(1A)(b) of the Act, which required it "to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative"; and
f. as a consequence, Ms Laukau was unjustifiably dismissed by KJR.

Orders

[67] For the above reasons I order KJ Randhawa Limited to pay Loisi Laukau within 28 days of the date of this determination:

a. $8,300 in lost wages under s 123(1)(b) of the Employment Relations Act (the Act); and
b. $20,000 in compensation under s 123(1)(c)(i) of the Act.

[7] See for example *Zhang v Telco Asset Management Ltd* [2019] NZEmpC 151 at [137] to [149].

Costs

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

[69] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Ms Laukau may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum KJR will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[70] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors require an adjustment upwards or downwards.[8]

[71] As the investigation meeting for this matter took most of one day, my preliminary view is the notional daily rate for one day is the appropriate starting point for a determination of costs.

Shane Kinley
Member of the Employment Relations Authority

[8] For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1