

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2012] NZERA Auckland 305
5365559**

BETWEEN RIPEKA NATHAN-BRISTOW
Applicant

AND MANA INTERNATIONAL
LIMITED t/a KAWAKAWA
FOUR SQUARE
Respondent

Member of Authority: Eleanor Robinson

Representatives: Mark Nutsford, Advocate for Applicant
Naina Bhikha for Respondent

Investigation Meeting: 16 August 2012 at Whangarei

Submissions received: 16 August 2012 from Applicant
None from Respondent

Determination: 4 September 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mrs Ripeka Nathan-Bristow, claims that she was unjustifiably dismissed by way of redundancy without warning or consultation on 14 November 2009 by the Respondent, Mana International Limited trading as Kawakawa Four Square (Kawakawa Four Square).

[2] Further Mrs Nathan-Bristow claims that she was subject to unilateral changes in her working hours, was not provided with an employment agreement, and was discriminated against because she had joined a union, as a result of which she was unjustifiably disadvantaged in her employment.

[3] Kawakawa Four Square denies that Ms Nathan-Bristow was unjustifiably disadvantaged in her employment or unjustifiably dismissed and claims that it followed a fair procedure in restructuring its business which resulted in the termination of Ms Nathan-Bristow's employment on the grounds of redundancy.

Issues

- [4] The issues for determination are whether Mrs Nathan-Bristow was unjustifiably:
- a. dismissed from her employment
 - b. disadvantaged in her employment by the unilateral alteration of her hours
 - c. disadvantaged in her employment by the non-provision of an employment agreement
 - d. discriminated against in her employment because she had joined a union

Background Facts

[5] Mrs Nathan-Bristow commenced employment at Kawakawa Four Square in January 2007 following an interview with Mr and Mrs Bhikha. Mrs Nathan-Bristow stated, and Mrs Bhikha confirmed, that it was agreed she would work 40 hours per week at an hourly rate of \$12.50.

[6] Mrs Nathan-Bristow's duties were to work at the checkout, fill shelves, and to perform duties in the delicatessen area, including the slicing of ham and luncheon meat.

[7] Mrs Nathan-Bristow said when she returned from holiday in May 2008, she was informed in a letter signed by Mrs Bhikha that her hours had been reduced to 30 hours per week. Mrs Nathan-Bristow said there had been no consultation or discussion with her prior to receiving this letter.

[8] Mrs Bhikha said she had informed Mrs Nathan-Bristow of the need to reduce her hours due to a reduction in the business of Kawakawa Four Square and had shown her the accounts and had arranged for Kawakawa Four Square's accountant talk with her (Mrs Nathan-Bristow). Mrs Nathan-Bristow denied this had happened.

[9] Mrs Nathan-Bristow said she had protested about the reduction in her hours to Mrs Bhikha and as she was a member of the National Distribution Union (NDU) she had telephoned the NDU and also the Department of Labour. Mrs Nathan-Bristow said Mrs Bhikha had not been pleased when she told her she had made the calls, and she believed that

Mrs Bhikha had already started to discriminate against her by employing other employees at a higher hourly rate than she received.

[10] Mrs Nathan-Bristow said she had requested an employment agreement on several occasions; however Mrs Bhikha would respond that she had to consult her accountant, and no employment agreement had been provided. Mrs Nathan-Bristow said she had telephoned the Department of Labour on 6 May 2008 and asked for a Labour Inspector to come and see her to discuss the non-provision of an employment agreement and some other concerns she had; however no Labour Inspector had come to see her.

[11] Mrs Bhikha denied that Mrs Nathan-Bristow had asked her for an employment agreement, but confirmed that none of the employees had an employment agreement at that time. On balance I find Mrs Nathan-Bristow's assertion that she requested an employment agreement to be more credible than Mrs Bhikha's statement that she had not done so.

[12] Mrs Bhikha explained that during the period of Mrs Nathan-Bristow's employment the requirements regarding the operation of the delicatessen had changed in that it became a requirement that the meats were to be supplied in sealed pre-sliced packets rather than being sliced on the premises, and a larger chiller unit had been purchased. Both of these changes had an impact on the role Mrs Nathan-Bristow had been performing and her hours had been further unilaterally reduced at this time to 20 hours per week.

[13] Mrs Bhikha said that there had been performance issues with Mrs Nathan-Bristow including her handling of cash and cheques when working on the check-out and her non-attendance at a liquor licensing course.

[14] Mrs Nathan-Bristow denied that she had had difficulties handling cash although she had experienced some difficulty in following the cheque handling procedures, however on these occasions another member of staff assisted her.

[15] Mrs Nathan-Bristow said she had attended the liquor licensing course on two occasions, however she had failed to obtain the qualification.

[16] Mrs Nathan-Bristow said she had not received any warnings concerning these issues. Mrs Bhikha stated she believed she had spoken to Mrs Nathan-Bristow about the issues on one occasion.

[17] On 5 November 2009 Mrs Nathan-Bristow said she had been handed a letter by Mrs Bhikha dated 3 November 2009 which stated that due to Kawakawa Four Square suffering a

downturn in business as a result of increased competition, Mrs Nathan-Bristow's position was to be terminated on the basis of redundancy on 16 November 2009.

[18] Mrs Nathan-Bristow said Mr Param Patel, a more recent employee, had also been advised that his position was redundant at this time.

[19] Although the letter commenced: "*As you have been previously advised ..*" Mrs Nathan-Bristow said she had not been made aware that her job was at risk before she received this letter.

[20] Mrs Nathan-Bristow had responded by way of a letter which was dated 4 November 2009 as it had been drafted on that date to express Mrs Nathan-Bristow's concerns about the reduction in her hours and which referred to Mrs Bhikha making remarks on 4 November 2009 insinuating that she wished to 'get rid of' Mrs Nathan-Bristow.

[21] The letter dated 4 November 2009 also referred to Mrs Bhikha having asked Mrs Nathan-Bristow if she could: "*go and find another job*". The letter stated:

Because of your continual non response and the threatening nature I am now lodging a personal grievance. I will ask the NDU union and my lawyer to pursue remedial action.

The letter concluded by referring to the letter of 5 November 2009 from Mrs Bhikha advising Mrs Nathan-Bristow that her position was redundant, and requested a staff meeting to be held on 6 November 2009.

[22] Mrs Bristow-Nathan said she had contacted the NDU and Mr Trevor Noel, NDU representative, had arrived at Kawakawa Four Square on 6 November 2009.

[23] Mrs Bhikha said she had agreed to attend the meeting on the understanding that this was to be a staff meeting, however when Mrs Nathan-Bristow arrived with Mr Noel, Mrs Bhikha had refused to attend the meeting or to have it held in the store, and the meeting had taken place in the store car park.

[24] Following the meeting Mrs Bhikha said she and Mr Noel had spoken and he had advised her that the procedure she had been following by making Mrs Nathan Bristow and one other employee redundant was not correct. As a result Mrs Bhikha said she had posted a notice on the staff notice board asking for volunteers for redundancy.

[25] Ms Rupunga Kaka, a casual employee, said she had spoken to Mrs Bhikha and offered to take voluntary redundancy, not because she wanted to do so, but in order that Mrs Nathan-Bristow would not be made redundant. Ms Kaka said Mrs Bhikha had rejected her

offer and had made it clear to her that it was Mrs Nathan-Bristow whom she wanted to make redundant.

[26] Mrs Nathan-Bristow said she had received a letter dated 13 November 2009 and signed by Mrs Bhikha. The letter stated:

However the financial position for the company is not improving as anticipated and in order to manage during these difficult times we have no option but to reduce the number of staff. As a result, we have to make your position redundant effective from tomorrow.

[27] Mrs Nathan-Bristow said she had been very upset to receive the letter, and her distress had been compounded when she had been informed by another member of the small local community in which she and her husband, a youth worker, had lived and worked that it was believed she had been dismissed for theft.

Determination

Was Mrs Nathan-Bristow unjustifiably dismissed from her employment?

[28] Mrs Nathan-Bristow was dismissed on the basis of redundancy on 14 November 2009. The Test of Justification prior to the amendment on 1 April 2011 and which is applicable in this case, is set out at s 103A of the Act which states:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred"

[29] Mrs Bhikha stated that the reason for the redundancy situation was attributable to increasing competition which had an adverse effect on profitability. However even where a genuine redundancy situation exists, the employer must still follow a due and proper process prior to terminating an employee's employment on the basis of redundancy.

[30] When considering whether Kawakawa Four Square followed a due and proper process when terminating Mrs Nathan-Bristow's employment on the basis of redundancy, other provisions of the Act are relevant. Section 4 of the Act addresses the requirement for parties to the employment relationship to deal with each other in good faith. Section 4(1A)(c) in particular is relevant to a redundancy situation and 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 an employee to provide to the employee affected:

“(i) *access to information, relevant to the continuation of the employees’ employment, about the decision; and*

(ii) an opportunity to comment on the information to their employer before a decision is made.” s4 (1A)(i) and (ii).

[31] In a redundancy situation a fair and reasonable employer must, if challenged, be able to establish that he or she has complied with the statutory obligations of good faith dealing in s4 of the Act. His Honour Chief Judge Colgan in *Simpsons Farms Limited v Aberhart*¹ noted that this compliance with good faith dealing includes consultation “*as the fair and reasonable employer will comply with the law*”²

[32] The nature of consultation was commented upon by the then Chief Judge Goddard in *Cammish v Parliamentary Service*³ who stated:

Consultation is to be a reality, not a charade. The party to be consulted must be told what is proposed and must be given sufficiently precise information to allow a reasonable opportunity to respond. A reasonable time in which to do so must be permitted. The person doing the consulting must keep an open mind and listen to suggestions, consider them properly, and then (and only then) decide what is to be done. However, consultation is less than negotiation and the assent of the person consulted is not necessary in the action taken following proper consultation.

[33] Mrs Nathan-Bristow said that she had been initially advised that her position was redundant by way of a letter on 5 November 2009. Despite the letter stating: “*as you have been previously advised ...*” Mrs Nathan-Bristow said she had not been aware that her job was at risk prior to receiving this letter.

[34] Following the intervention by the NDU as represented by Mr Noel, the redundancy process, if indeed there was one, appeared to have been halted whilst Mrs Bhikha asked for volunteers for redundancy by means of the notice posted on the staff notice board.

¹ [2006] ERNZ 825,842

² Ibid at para [40]

³ [1996] 1 ERNZ 404, per Goddard CJ at p417

[35] However I find that the evidence of Ms Kaka, whose application for voluntary redundancy was refused, supports the conclusion that the intervention of the NDU had not deflected Mrs Bhikha from her original decision that Mrs Nathan-Bristow's position was to be made redundant.

[36] I find no evidence that Mrs Nathan-Bristow had been consulted about the proposed course of action in accordance with s 4(1A)(c)(ii) of the Act, nor that she had been provided with an opportunity to comment upon it prior to it being implemented.

[37] Even in the case of a genuine redundancy situation for commercial reasons, which I am minded to accept this was, a just employer, subject to the mutual obligations of trust and confidence and fair dealing, will implement the decision in a fair and reasonable manner. I find however that Kawakawa Four Square did not comply with the requirements of s4 (1A). In particular, a fair and reasonable employer would have consulted with Mrs Nathan-Bristow about the redundancy; however Kawakawa Four Square failed to do so.

[38] Accepting that this was a genuine redundancy situation, the employer is expected to act fairly and reasonably in the selection of positions to be made redundant.

[39] The reasons advanced by Mrs Bhikha for the selection of Mrs Nathan-Bristow's position appeared to be the change in her duties in the delicatessen area, the performance issues relating to her cash and cheque handling and non-attendance at the liquor licensing course, and her reluctance to reduce her hours.

[40] In regard to the change in Ms Nathan-Bristow's duties and hours, I note that at the relevant time, Kawakawa Four Square employed casual employees whose hours could be legitimately reduced on the basis of their employment status, and at least one of whom was engaged to carry out duties which were able to be adequately carried out by Mrs Nathan-Bristow.

[41] In regard to the other issues, these are disciplinary matters. No formal performance management process was undertaken in relation to these matters and Mrs Nathan-Bristow was unaware that these issues might adversely affect her on-going employment.

[42] I find that the selection of Mrs Nathan-Bristow's position for redundancy by Kawakawa Four Square was not made on a fair and reasonable basis.

[43] I find that the dismissal of Mrs Nathan-Bristow was not a decision a fair and reasonable employer would have made in all the circumstances at the relevant time. I determine that Mrs Nathan-Bristow was unjustifiably dismissed from her employment.

Whether the unilateral alteration in Ms Nathan-Bristow's hours constituted a disadvantage in employment

[44] Mrs Nathan-Bristow claims that the unilateral reduction in her hours from 40 to 30 hours per week in May 2008, and subsequently from 30 to 20 hours per week shortly after this date constituted a disadvantage in employment to her.

[45] To be successful in a claim for unjustifiable disadvantage, pursuant to s 103(1)(b) of the Act, an employee must show:

That the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment) is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer

[46] There are two limbs to the test for unjustifiable disadvantage as set out in s 103(1)(b): firstly there must be an unjustifiable action by the employer, and secondly that action must have caused disadvantage to the employee.

[47] Mrs Nathan-Bristow was employed on the basis that she would be provided with 40 hours of work each week. Mrs Nathan-Bristow accepted and commenced employment on this basis, and I find that the subsequent reduction in her working hours without her having been either consulted about or having agreed to it, to be an unjustifiable action by Kawakawa Four Square.

[48] The associated reduction in her weekly wages I find to have disadvantaged Mrs Nathan-Bristow in her employment.

[49] I determine that the unilateral reduction in her hours constituted a disadvantage in employment to Mrs Nathan-Bristow.

Whether the failure to provide Mrs Nathan-Bristow with an employment agreement constituted a disadvantage in employment

[50] Employers are under an obligation to provide employees with an employment agreement pursuant to s 63A of the Employment Relations Act 2000 (“the Act”), which states:

63A Bargaining for individual employment agreement or individual terms and conditions in employment agreement

(2) The employer must do at least the following things:

(a) provide to the employee a copy of the intended agreement, or part of the intended agreement, under discussion; and

(d) consider any issues that the employee raises and respond to them

[51] Section 65 is also relevant:

65 Terms and conditions of employment where no collective agreement applies

i. The individual employment agreement of an employee whose work is not covered by a collective agreement that binds his or her employer-

1. must be in writing; and or her employer –

2. May contain such terms and conditions as the employee and employer think fit

[52] Further the Employer has a duty of good faith pursuant to s 4 (1A) (b) of the Act, which states at s4 (1A)(b):

4 Parties to employment relationship to deal with each other in good faith

(1A)

(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 (emphasis mine)

[53] Mrs Nathan-Bristow said that she had asked a Labour Inspector to assist her with this issue, however this had not eventuated. Had it done so, this might have resolved this matter. However there was no provision of an employment agreement and consequently I find that Kawakawa Four Square acted in breach of the good faith requirement by not providing Nathan-Bristow with an employment agreement pursuant to s65 of the Act.

[54] It is a matter of public policy that employers do not flaunt the legislative requirements, rather they should adhere to the legislative requirements. I determine that Kawakawa Four Square has failed to so adhere, and a penalty is applicable.

The failure to provide Mrs Nathan-Bristow with wage and holiday time records

[55] Mrs Nathan-Bristow stated that no wage or time records were provided to her following a request made pursuant to s 130(2) of the Act.

[56] I find that Kawakawa Four Square deliberately failed to provide the requested records, and as such s130 (4) of the Act applies and a penalty is applicable.

Whether Ms Nathan-Bristow was unjustifiably discriminated against in her employment because she had joined a union

[57] Mrs Nathan-Bristow claims that she was unjustifiably discriminated against on the basis of her union membership. After the initial reduction of her hours in May 2008, Mrs Nathan-Bristow said she had informed Mrs Bhikha that she had telephoned the NDU, and that Mrs Bhikha had been displeased.

[58] Following this incident Mrs Nathan-Bristow said she had been discriminated against by Mrs Bhikha resulting in a further reduction in her hours, and by her subsequent dismissal on the basis of redundancy.

[59] Section 119 of the Act raises a rebuttal presumption in cases in which discrimination is claimed. The section requires that the employer provides a legitimate justification for the decisions and actions that disadvantaged the employee.

[60] I have found that Mrs Nathan-Bristow was unjustifiably dismissed by way of redundancy, and that she was unjustifiably disadvantaged by the unilateral reduction of her hours. Mrs Bhikha raised no legitimate justification for these actions in her evidence, and when questioned at the Investigation Meeting, agreed that she had not wanted union involvement in Kawakawa Four Square and that she was anti-union.

[61] Although Mrs Bhikha denied that these views influenced her decision-making process, I find that Kawakawa Four Square has not rebutted the presumption that Mrs Nathan-Bristow was discriminated against on the basis of her union membership.

Remedies

Reimbursement of Lost Wages

[62] Mrs Nathan-Bristow said she had had medical consultations as a result of her distress at the dismissal and consequential impact in the local community, and had been unable to look for alternative employment for some time after the termination of her employment.

[63] Mrs Nathan-Bristow is to be reimbursed for lost earnings from the date of her dismissal on 14 November 2009 for a period of 13 weeks.

[64] I make the following award:

- a. A payment of \$4,875.00 gross in respect of 12 weeks salary payment at the rate of \$12.50 per hour x 30 hours.

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[65] Ms Nathan-Bristow is also entitled to compensation for humiliation and distress. I find that in respect of the unjustifiable dismissal, Ms Nathan-Bristow suffered significant distress as a result not only of the dismissal itself, but due to the implications of the small community in which the events took place.

[66] I have further found that Mrs Nathan-Bristow suffered hurt and humiliation in respect of the disadvantage grievances and the discrimination grievance,

[67] In respect of the dismissal, disadvantages and discrimination grievances, I order Kawakawa Four Square is to pay Ms Nathan-Bristow the sum of \$5,500.00, pursuant to s 123(1) (c) (i) of the Act.

Penalty

[68] Kawakawa Four Square is ordered to pay a penalty of \$500.00 to the Crown for the non-provision of an employment agreement to Mrs Nathan-Bristow, of which \$200.00 is to be paid to the Crown and \$300.00 to Mrs Nathan-Bristow in recognition of the disadvantage he has suffered..

[69] Kawakawa Four Square is ordered to pay a penalty of \$300.00 for the non-provision of wage and time records, of which \$100.00 is to be paid to the Crown and \$200 .00 is to be paid to Mrs Nathan-Bristow in recognition of the disadvantage she has suffered.

Costs

[70] Costs are reserved. I encourage the parties to resolve the issues of costs themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority