IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2019] NZERA 64
3031541

	BETWEEN	CELIA POPKIN Applicant
	AND	INNOVATIVE LANDSCAPES (2015) LIMITED Respondent

Member of Authority:	Andrew Dallas
Representatives:	Ma'a Faletanoai-Evalu, counsel for the Applicant Charlie McNoe for the Respondent
Investigation Meeting	2 November 2018 with further information received up to and including 20 November 2018
Date of the Determination	12 February 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Innovative Landscapes (2015) Limited employed Celia Popkin for a period of four years. During that time she worked as a landscape architect and also undertook on-site project work as required. Ms Popkin says she was unjustifiable dismissed as part of a defective restructuring and redundancy process. Innovative denied this.

The Authority's investigation

[2] Innovative initially only engaged with the Authority's processes on a limited basis. While it provided a statement in reply, it declined to attend mediation or a subsequently convened case management conference (CMC).

[3] During the CMC, the matter was set down for investigation and procedural directions were made. In a Minute of Authority subsequently issued to the parties setting out these directions, Innovative was also advised the Authority had the power to proceed in the absence of a party.

[4] During the Authority's investigation meeting, I heard evidence from Celia Popkin and Nicky Adams, another former employee of Innovative. Innovative director Charlie McNoe attended the meeting and gave evidence on behalf of the company. He also made submissions. Mr Faletanoai-Evalu of Community Law Canterbury represented Ms Popkin.

[5] Having regard to s 174E of the Act while I have not referred to all the evidence received from witnesses or the submissions advanced by the representatives in this determination, I record that I have fully considered this material.

Issues

[6] The issues that arose for determination during the Authority's investigation were:

> (i) Was Ms Popkin's dismissal, and how the decision was made, what a fair and reasonable employer could have done in all the circumstances at the time?;
> (ii) If Innovative's actions were not justified, what remedies should be awarded to Ms Popkin, considering:
> (a) Lost wages; and
> (b) Compensation for hurt, humiliation and injury to feelings; and
> (iii) If Ms Popkin is successful, should Innovative contribute to her costs of representation?

What happened?

[7] Mr McNoe bought Innovative from its previous owners in or about August 2015. He shuttered the business on 14 March 2018 after, on his evidence, a significant period of loss making. Despite this, the company remains registered. Mr McNoe said during the investigation meeting this was largely due to separate, unrelated legal proceedings he had brought in the High Court against the previous owners.

Meeting on 14 February 2018

[8] Ms Popkin and Ms Adams asked to meet with Mr McNoe. They advised him that while there was landscape design work to be undertaken, the work for the landscape construction side of the business was about to dry up. Mr McNoe said he told Ms Popkin and Ms Adams that as they could offer no solutions to keep Innovation viable, it would have to cease trading. Ms Popkin and Ms Adams said he did not say these things at the meeting. They further said if these comments had been made, given he had made similar comments a number of times over the previous two years they were not sure how seriously to take them.

Events on 21 February 2018

[9] On 21 February 2018, Ms Popkin said she was contacted by several employees working in the landscape construction side of the business who advised her that Mr McNoe had told them on 19 February 2018 the business was closing.

[10] In response to this, Ms Popkin and Ms Adams sought a meeting with Mr McNoe. He advised them the business was indeed closing and in three weeks. Ms Popkin and Ms Adams said they tried to gain a better understanding of what was happening during the meeting. McNoe agreed to provide them with a reference. However, Ms Popkin said she did not receive this.

Written notice of termination

[11] Mr McNoe furnished Ms Popkin with a generic notice of termination on 27 February 2018. The letter advised that a three week redundancy process had commenced upon verbal notification on 21 February 2018 – presumably at the meeting of that date – and that her last day of employment would be 14 March 2018.

[12] Mr McNoe said in his evidence he did not avert to, and thereby did not comply with, the restructuring and redundancy provision contained in cl 12 of Ms Popkin's employment agreement.

Post-employment

[13] Ms Popkin disputed her redundancy with Mr McNoe. She wrote to him on 13 March 2018 and set out her view about the process that Innovation should have undertaken. She requested payment of her contractual notice and a meeting with Mr McNoe. Nothing came of this.

[14] After Ms Popkin's employment had been terminated, she again wrote to Mr McNoe on 4 April 2018, this time raising a personal grievance for unjustified dismissal. In that letter Ms Popkin again set our her view that she had been underpaid one week's notice by Innovative because cl 12.6 of her employment agreement provided that in a redundancy situation she would receive "3 weeks notice in writing".

[15] As no resolution for her personal grievance was achieved, Ms Popkin caused Community Law Canterbury to lodge a statement of problem in the Authority.

The Authority's view of Ms Popkins' employment relationship problem

[16] The primary issue before the Authority is whether Ms Popkin's dismissal was justified. The test of justification under s 103A of the Act is to be applied on an objective basis by considering whether the employer's actions were what a fair and reasonable employer could have done in all the circumstances.

[17] The Court of Appeal in *Grace Team Accounting Ltd v Brake*[1] emphasised the importance of addressing the genuineness of a redundancy decision by showing that a non-genuine redundancy – one effected for a purpose other than genuine business needs – is unlikely to satisfy the s 103A test. Conversely, the Court suggested if an employer could demonstrate the redundancy was genuine, that contractual and the consultation requirements of s 4 of the Act have been complied with then that could be expected to go a long way towards satisfying the test.[2]

[1] [2014] ERNZ 129 (CA)
[2] At [85].

[18] The duty of good faith requires an employer proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of employees to provide the affected employees with access to information which is relevant to the continuation of employment and an opportunity to comment on that information before the decision is made.[3] The duty of good faith also applies to consultation between an employer and its employees about the effect on employees of changes to the employer's business and making employees redundant.[4]

[19] The Court of Appeal has observed that the focus of the inquiry as to whether an employer has met the test in s 103A of the Act is on substantial fairness[5] A key element of that inquiry in redundancy situations is whether the employer complied with its good faith obligations.[6]

[20] While Mr McNoe could satisfy the Authority the redundancy outcome for Ms Popkin was "genuine" because no-one was performing any work at the company, let alone performing the tasks undertaken by her, it was clear from the evidence the process adopted by Innovative was sparse, chaotic and lacking in transparency. Indeed, the process adopted was clearly at variance with Innovative's good faith obligations to Ms Popkin. Further, Innovative did not comply with contractual obligations to Ms Popkin by failing to avert to, let alone comply with, an express provision of her employment agreement dealing with restructuring and redundancy.

[21] It is not a great leap forward then, and one reasonably open on the facts, to find that Innovative did not comply with s 103A of the Act in effecting Ms Popkin's dismissal. I conclude Ms Popkin was unjustifiably dismissed by Innovative on 14 March 2018.

[3] Employment Relations Act 2000, s 4 (1A)(d).
[4] Employment Relations Act 2000, s 4 (1A)(c).
[5] *A Limited v H* [2016] NZCA 419 (CA)
[6] *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC28 ar [60].

Remedies

[22] As Ms Popkin has been found to have a personal grievance, she is entitled to an assessment of remedies.

Loss wages

[23] Ms Popkin sought an additional week's notice to comply with cl 12.6 of her employment agreement.

[24] Although I had found Ms Popkin's redundancy was genuine, she is entitled to an additional week's pay because her employment agreement said she would receive three weeks written notice of redundancy. On the facts, Ms Popkin received only two weeks written notice from Innovative.

[25] Subject to any contribution, Innovative must calculate and pay Ms Popkin one week's pay (including any applicable holiday pay) within 14 days for the date of this determination.

Compensation for hurt, humiliation and injury to feelings

[26] Ms Popkin sought compensation for hurt, humiliation and injury to feelings arising out of the termination of her employment by Innovative. She did not specify a compensatory figure in her statement of problem.

[27] Ms Popkin said she was very stressed and hurt by the termination of her employment. She said her stress and hurt was amplified by two specifics factors. First, Ms Popkin was not paid her contractual notice and, effectively, had to issue proceedings to recover this money. Second, other employees affected by the redundancy process came to rely on her to provide information in the absence of any being forthcoming from Innovative. This is clearly an unacceptable practice and one inconsistent with Innovative's good faith obligations.

[28] Taking these matters and other surrounding circumstances into account it is appropriate for Innovative to pay Ms Popkin $15,000 under s 123(1)(c)(i) of the Act within 14 days of the date of this determination.

Contributory conduct by Ms Popkin?

[29] Having found that Ms Popkin was entitled to a remedy for a personal grievance for unjustified dismissal, I was required by s 124 of the Act, despite this being a redundancy situation, to consider whether she contributed to the situation giving rise to her grievance.

[30] There was no evidence before the Authority of any conduct by Ms Popkin which contributed to the termination of her employment by Innovative. Consequently, no deduction for contribution was needed.

Costs

[31] Costs are reserved. The parties are invited to resolve the matter between them. If they are unable to do so, Ms Popkin has 28 days from the date of this determination in which to file and serve a memorandum on costs. Innovative has a further 14 days in which to file and serve a memorandum in reply.

[32] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless particular circumstances or factors require an adjustment upwards or downwards.[7]

Andrew Dallas
Member of the Employment Relations Authority

[7] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135.