

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 250
5525475

BETWEEN

PAMELA JO SAROZ
Applicant

A N D

FLOWER FEVA LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Jeremy Browne, Counsel for the Applicant
Damian Luiten, Director of Respondent

Investigation Meeting: 17 August 2015 at Whangarei

Date of Determination: 18 August 2015

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] Ms Saroz started work for Flower Feva Limited (Flower Feva) in June 2009 as the Florist Manager. Flower Feva was situated in the Palmers Garden Centre in Whangarei. Ms Saroz was made redundant when Flower Feva ceased trading on 19 May 2014.

[2] Ms Saroz was not provided with a written employment agreement. The parties agreed that Ms Saroz would be paid a salary of \$16.50 per hour for 42.5 hours per week to be paid fortnightly. She did not get overtime but it was agreed that for hours worked in excess of 42.5 per week she could take time off in lieu (TOIL). Ms Saroz was also provided with a work vehicle and a fuel card.

[3] On 17 May 2013 Mr Damian Luiten, the Director of Flower Feva, handed Ms Saroz a memorandum recording the decline in Flower Feva's financial position and setting out some options to save money. Mr Luiten says it must have been obvious to Ms Saroz that the business was not doing well in the 12 months before it

closed. Flower Feva says Ms Saroz's dismissal was justified because the business ceased trading.

[4] On 19 May 2014 Mr Luiten called Ms Saroz to a meeting and announced that he was closing down the Flower Feva business. Ms Saroz was handed a letter of termination which advised she was being made redundant that day because the business was closing. Ms Saroz's employment ended immediately and she was paid two weeks' pay in lieu of notice.

[5] Ms Saroz claims:

- (a) Unpaid sick leave for 22 April 2012;
- (b) Unpaid TOIL;
- (c) Outstanding public holiday entitlements;
- (d) Annual holiday pay arrears;
- (e) Her redundancy dismissal was unjustified;
- (f) KiwiSaver contributions on all amounts awarded to her;
- (g) Interest;
- (h) Costs.

[6] There is also a conflict over the date on which Ms Saroz started work. She says she started work on Tuesday 02 June 2009 but Mr Luiten says she did not start work until 08 June 2009. Related to that is an issue of whether or not Ms Saroz was paid in arrears or partially in arrears and partially in advance. If it is the latter then Mr Luiten claims Ms Saroz was overpaid a week's pay on termination.

Issues

[7] The following issues are to be determined:

- (a) What date did Ms Saroz start work?
- (b) Is Ms Saroz paid in arrears or partially in advance?
- (c) Is Ms Saroz owed paid sick leave for her absence on 22 April 2012?
- (d) Is Ms Saroz owed payment for unused TOIL?
- (e) Is Ms Saroz owed unpaid public holidays entitlements?

- (f) Is Ms Saroz owed annual holiday pay?
- (g) Was Ms Saroz's dismissal justified?
- (h) If not, what if any remedies should be awarded?
- (i) Is Ms Saroz owed Kiwisaver contributions?
- (j) Should Ms Saroz be awarded interest?
- (k) What if any costs should be awarded?

What date did Ms Saroz start work?

[8] I am satisfied on the balance of probabilities that Ms Saroz started work on 02 June 2009 so that is the date to be used when calculating her Holidays Act 2003 (HA03) entitlements.

[9] This date was supported by a handwritten roster which was made up by the then manager (not Ms Saroz) which shows Ms Saroz worked the week commencing 02 June 2009.

[10] If Mr Luiten was correct then he would have overpaid Ms Saroz on termination which I consider unlikely. Flower Feva did not have sufficient funds to pay Ms Saroz's final pay upon termination so the money she received was taken by Mr Luiten from another company he was associated with. I doubt he would have paid Ms Saroz an extra week's pay without advising her of that in circumstances.

Is Ms Saroz owed paid sick leave for her absence on 22 April 2012?

[11] I accept Ms Saroz's evidence that she was genuinely sick on 22 April 2012. She was not paid for this day despite her having an accrued but unused sick leave entitlement.

[12] I find that Ms Saroz is entitled to be paid by Flower Feva for one day's sick leave which is to be calculated in accordance with s.71(1) HA03.

Is Ms Saroz owed payment for unused TOIL?

[13] Although Mr Luiten disputed that there was a mutual agreement to pay Ms Saroz unused TOIL upon termination he accepts that because Ms Saroz was advised of her immediate redundancy she did not in fact have time to use the TOIL she had accrued before her employment was terminated.

[14] Mr Luiten told the Authority that as a gesture of goodwill he was prepared to assume liability to pay Ms Saroz the 6.85 days TOIL she had accrued as at 19 May 2014. I order this TOIL entitlement to be paid at the rate of Ms Saroz's relevant daily pay as defined in s.9 HA03.

Is Ms Saroz owed outstanding public holidays entitlements?

[15] The parties agree that Ms Saroz is owed under s.50 HA03 the equivalent of 5.25 days as unpaid time and a half pay for the hours she worked on public holidays. This entitlement is to be calculated as per Ms Saroz's hourly rate as it applied on 19 May 2014.

[16] Ms Saroz is also owed 5 days alternative holiday as per ss.56 & 57 HA03. This entitlement is to be calculated as per s.61(2)(b)(i) HA03.

Is Ms Saroz owed annual holiday pay arrears?

[17] Ms Saroz is owed unpaid holiday pay because she was not paid any HA03 entitlements upon termination. The start date for calculating her annual holiday entitlements is 02 June 2009.

[18] Ms Saroz is owed 17.5 days accrued but unused annual holidays under s.24 HA03. This entitlement is to be calculated as per s.24(2) HA03.

[19] Ms Saroz is also owed 8% of her total gross earnings from 02 June 2013 (being her annual holiday anniversary date) to 19 May 2014 (being her date of termination) under s.25(1) HA03. Ms Saroz's gross earnings include all HA03 entitlements, her KiwiSaver entitlements/contributions plus the TOIL she has been awarded in this determination.

Was Ms Saroz's dismissal justified?

[20] Justification is to be assessed in accordance with the justification test in s.103A of the Employment Relations Act 2000 (the Act). This requires the Authority to objectively assess whether Flower Feva's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time Ms Saroz was dismissed.¹

¹ Section 103(2) of the Act

[21] A fair and reasonable employer is expected to comply with its statutory obligations which include the duty of good faith and the four procedural fairness tests in s.130A(3) of the Act. Failure to do so undermines an employer's ability to justify its actions and how it acted.²

Good faith

[22] Mr Luiten says that even if he did not follow a proper process for making Ms Saroz redundant she still had access to information in her capacity as manager of the business so was acutely aware of its deteriorating financial position.

[23] Mr Luiten says Ms Saroz was provided with sales reports weekly and that the two of them spoke frequently (almost daily) about the business and his concerns about its lack of profitability. I find that Ms Saroz had limited information about the overall business because it was effectively being run by Mr Luiten.

[24] Section 4(1)A of the Act requires an employer who is proposing to make a decision which may adversely impact on an employee's ongoing employment to provide that employee with relevant information and opportunity to comment on it before a final decision is made.

[25] Mr Luiten says good faith requirements were complied with because Ms Saroz could have found the information herself. I find that the situation described by Mr Luiten does not meet the requirements of s.4(1A) of the Act. Flower Feva was obliged to provide Ms Saroz with relevant information about her ongoing employment – it could not assume she already had access to it.

[26] I find Flower Feva breached its s.4(1A) good faith obligations under the Act. Ms Saroz was simply told she had been made redundant. She was not given any information before being made redundant much less an opportunity to comment on relevant information before she was dismissed.

Procedural fairness

[27] I find that Flower Feva did not comply with any of the four procedural fairness tests in s.103A(3) of the Act. These breaches fundamentally undermines Flower Feva's ability to justify Ms Saroz's dismissal.

² Supra.

Substantive justification

[28] During the Authority's investigation Ms Saroz conceded that her redundancy dismissal was substantively justified because Flower Feva shut down its business due to financial issues.

[29] I consider this was a realistic concession to make because at the date Ms Saroz's employment terminated Flower Feva owed \$74,000 rent arrears, it owed its shareholders \$70,000, it had \$23 in its bank account so could not pay staff and had considerable unpaid debts to its suppliers.

[30] I do not consider it likely that there were any counter suggestions that Ms Saroz could have made in the circumstances that would have enabled the business to have turned around its financial situation even if a fair and proper process had been adopted.

Outcome

[31] I find that Flower Feva is unable to justify Ms Saroz's dismissal because it failed to follow a fair or proper process before making her redundant. Although there was a good reason for making Ms Saroz redundant (namely the Flower Feva business closed) the circumstances were such that Flower Feva still could and should have properly consulted with her before that occurred.

What if any remedies should be awarded?

Lost Remuneration

[32] Because Ms Saroz's dismissal was substantively justified she is not entitled to lost remuneration. Her remedies are therefore limited to distress compensation.

Distress compensation

[33] Ms Saroz says that she was very distressed by her unjustified dismissal. She was unable to budget to pay essential bills such as mortgage repayments, rates, insurance and electricity. She had to cash in her savings and bonus bonds to cover her expenses and had to apply for a WINZ benefit. Ms Saroz was out of work for 13 weeks.

[34] I accept that Ms Saroz was distressed and humiliated because of the manner in which her dismissal was implemented. Flower Feva is ordered to pay Ms Saroz

\$6,000 under s.123 (1)(c)(i) of the Act to compensate her for the humiliation, loss of dignity and injury to feelings she suffered as a result of her unjustified dismissal.

Contribution

[35] Having determined that Ms Saroz has a dismissal grievance s.124 of the Act requires me to assess the extent to which Ms Saroz contributed to the situation that gave rise to her grievance and to reduce remedies accordingly.

[36] Contribution denotes blameworthy conduct which is established on the balance of probabilities. Mr Luiten suggested that because Ms Saroz was the only person working in the Flower Feva shop she must have somehow contributed towards its decline. I do not accept that. I find that Ms Saroz did not contribute to her dismissal so her award of distress compensation is not to be reduced.

Is Ms Saroz owed Kiwisaver contributions?

[37] Ms Saroz is a KiwiSaver member so Flower Feva is required to pay KiwiSaver contributions on her behalf. Ms Saroz's KiwiSaver employee contributions are to be deducted from her earnings and remitted to Inland Revenue Department.

[38] Flower Feva is also required to pay its KiwiSaver employer contributions in addition to the amounts Ms Saroz earned because it did not have a Total Remuneration approach to KiwiSaver entitlements. This means that Flower Feva's Kiwisaver employer contributions are not to be taken out of Ms Saroz's earnings but must be paid on top of her earnings.

Should Ms Saroz be awarded interest?

[39] Ms Saroz was entitled to be paid her HA03 entitlements (which included her employer's KiwiSaver contributions) upon termination. That did not occur.

[40] Flower Feva has had the benefit of Ms Saroz's money since she was made redundant over a year ago. Mr Luiten's evidence was that most of Flower Feva's creditors have been repaid in full. However Ms Saroz has still not received her statutory entitlements.

[41] An award of interest is discretionary. I am satisfied it is appropriate to exercise that discretion to award Ms Saroz interest under the Judicature Act 1908.

[42] Accordingly Flower Feva is ordered to pay interest at the current rate of 7.5% on the total amount of all HA03 and KiwiSaver entitlements³ that Ms Saroz has been awarded under this determination. Interest is to run from 27 May 2014 (a week after her date of termination) until the amounts awarded have been paid in full.

Amounts awarded

[43] The parties are encouraged to agree on the amounts this Authority does not currently have the information to calculate the various amounts Ms Saroz has been awarded.

[44] The parties are encouraged to agree on the amounts awarded and to advise the Authority accordingly by 26 August 2015 of the agreed amounts. If agreement is not reached then either party may apply to the Authority by 02 September 2015 to fix the appropriate amounts. Each party must therefore provide their figures and an explanation as to why their calculations should be preferred over the other party's calculations.

What if any costs should be awarded?

[45] Ms Saroz as the successful party is entitled to a contribution towards her actual costs. Costs are reserved pending agreement by the parties or fixing by the Authority (as the case may be) of the various amounts Ms Saroz has been awarded in this determination.

Rachel Larmer
Member of the Employment Relations Authority

³ Interest is not awarded on the award of distress compensation or on the amount of TOIL Mr Luiten has voluntarily agreed to pay.