

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2022] NZERA 13
3126834

BETWEEN REBECCA SCHOLLUM
Applicant
AND IN RESIDENCE LIMITED
Respondent

Member of Authority: Nicola Craig
Representatives: Simon Mitchell, counsel for the applicant
Stephan Marshall for the respondent
Investigation Meeting: 21 October 2021 by audio-visual link
Submissions [and further Information] Received: At the investigation meeting from the applicant
At the investigation meeting from the respondent
Date of Determination: 21 January 2022

DETERMINATION OF THE AUTHORITY

- A. Rebecca Schollum was unjustifiably dismissed by In Residence Limited.**
- B. In Residence Ltd is to pay Ms Schollum within 28 days of the date of this determination:**
- (a) \$7,800.00 gross lost wages; and**
 - (b) \$17,500 as compensation for humiliation, loss of dignity and injury to feelings.**
- C. Costs are reserved and a timetable set.**

What is the Employment Relationship Problem?

[1] Rebecca Schollum was a sales support co-ordinator, working twenty hours a week, for In Residence Limited (In Residence or the company). In Residence imports and sells high

quality kitchen and bathroom fittings. Ms Schollum's work included the managing and allocating of stock and supporting the sales team in Australia.

[2] In March 2020 In Residence informed Ms Schollum that she was made redundant. She claims that she was unjustifiably dismissed by the company. In Residence does not accept that.

[3] An investigation meeting was held on 21 October 2021. The meeting was conducted via audio-visual link by agreement, as Auckland was at Covid Alert Level 3 at this time. Evidence was heard from Ms Schollum and Stephan Marshall, In Residence's managing director.

[4] All material provided by the parties has been carefully considered. As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination has not recorded everything received but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

How did Ms Schollum's employment end?

[5] On Friday 20 March 2020 the New Zealand border was closed and the following day the Alert Level system introduced, with Level 2 implemented. On Monday 23 March 2020 the Government announced that New Zealand would move into Alert Level 3, with a lockdown at Alert Level 4 to start on 26 March 2020.

[6] Mr Marshall had examined the Covid situation internationally and the company's circumstances over the weekend and planned to talk to Ms Schollum on Monday. He acknowledges that he had already made a decision to disestablish two support positions. However, Ms Schollum did not come into work on Monday as her daughter was unwell.

[7] Ms Schollum had previously done occasional work from home and was thinking that she could assist the business in lockdown by performing some of her work at home.

[8] Mr Marshall called Ms Schollum to ask her about coming into work. She was concerned due to her child's unwellness. By this point childcare agencies and schools had generally stopped receiving children. Mr Marshall said he would move her work station to a larger space so he and she could continue to work in the office. Ms Schollum indicated she would come in the following day but would need to bring her two children with her.

[9] On Tuesday In Residence held a socially distanced birthday morning tea for a staff member, with Ms Schollum attending. When asked what the arrangements were for lockdown, Mr Marshall told staff he was going to have individual meetings. Ms Schollum was called in to a meeting with him.

[10] They talked about the Covid situation. There was brief mention of the difficulties of working from home with children but Ms Schollum was intending to do her best. Her dealings with the Australian sales team had always been remote interactions so she was used to that way of working.

[11] Mr Marshall then told Ms Schollum she was being made redundant. She describes herself as being blind-sided by the news. Fairly, Ms Schollum acknowledges that this was not an easy situation for Mr Marshall and he seemed regretful and reluctant to let her go.

[12] Mr Marshall was aware of the government's wage subsidy at this point and, around this time, applied for it. But the subsidy was not discussed at the meeting. It was apparent at the investigation meeting, Mr Marshall had been focused on giving Ms Schollum certainty (of knowing when her job was over) rather than the uncertainty of paying the subsidy with the impending prospect that she might then be made redundant.

[13] Mr Marshall told Ms Schollum that she would be paid four weeks' notice. That was provided in her employment agreement although due to a misunderstanding, Mr Marshall thought he was giving two weeks' additional pay on top of the company's standard two week notice period. He offered to provide a reference.

[14] Ms Schollum ceased work as of 24 March 2020, with In Residence requiring nothing further of her.

[15] No letter of termination or final pay slip was initially provided. After four weeks Ms Schollum contacted Mr Marshall requesting confirmation in writing of redundancy and for a breakdown of her final pay.

[16] When Ms Schollum phoned Mr Marshall to follow up on her request, he advised that she could be paid the wages subsidy. At this time the notice period had already expired and neither party suggested this was an offer to retract her redundancy. It was an offer to pay the wage subsidy which In Residence had already applied for and received.

[17] Ms Schollum replied that her understanding was that the wage subsidy was for employers to use to ensure employees were not made redundant, which was not their situation. Mr Marshall said she had the choice to accept it or he would send the money back to the government. Ms Schollum felt uncomfortable accepting the subsidy and declined. When she enquired with the Ministry of Social Development (MSD) she was told that the subsidy had been applied for in her name, which she was unhappy about. Mr Marshall refers to the wage subsidy for Ms Schollum later being repaid to the government.

[18] The confirmation of redundancy was provided by In Residence about ten days after it was requested.

Did In Residence follow a proper process?

[19] To avoid an unjustified dismissal finding, employers must act as a fair and a reasonable employer could have done in all the circumstances.¹

[20] In Residence had recently fitted out its new showroom and introduced a new computer system, using cash reserves and money borrowed from the bank. Mr Marshall provided the Authority with some explanation of the company's financial position, its evaluation process and why it chose the roles it did for redundancy. But that information and explanation was not provided to Ms Schollum at the time she was told of her redundancy.

[21] Mr Marshall desired to talk to his affected employees face to face. However, in doing so In Residence missed the following steps of a fair process:

- Notifying Ms Schollum of what the meeting was about in advance and/or providing time after the meeting for her to consider a proposal
- Provide sufficient information and explanation about the proposal²
- Consulting with her about the possibility of her job disappearing and any alternatives to redundancy, hearing and considering what she had to say.

¹ The Act, s 103A.

² Good faith obligations in the Act, s 4(1A).

[22] There was also no suggestion that she could seek support for the meeting or advice about any proposal.

[23] In Residence had already made its decision and simply informed Ms Schollum that she was redundant. It was a difficult time for many in New Zealand but employment obligations remained in place and In Residence has not satisfactorily explained it did not plan to utilise the wage subsidy at the start and to undertake a consultation process, even if this had to be carried out in a way which would not normally have been ideal. It made its own decisions about what it thought was preferable for Ms Schollum, rushing to implement the decision before Level 4 began, rather than discussing the options with her. These cannot be accepted as minor matters which did not result in any unfairness.

[24] Ms Schollum's role as such appears to have disappeared from In Residence but in the absence, before the decision was made, of any consultation about alternatives to redundancy including the prospect of the wage subsidy I cannot be satisfied that her redundancy was inevitable. There was no discussion, for example of reduced hours which would have enabled Ms Schollum to undertake some work which could continue during lockdown.

[25] In Residence did not act as a fair and reasonable employer could have done. Ms Schollum was unjustifiably dismissed by it.

What remedies should Ms Schollum receive?

Lost wages

[26] Ms Schollum started looking for other work almost immediately although initially, in lockdown, there were not many available jobs. Over time she applied for a number of roles focused on her area of experience. She started in a new position in October 2020. She had almost 29 weeks without work, losing \$17,400 gross in wages. She did receive the Covid income relief payment but it is not the Authority's practice to deduct social support from lost wages amounts. That is a matter which must be resolved between Ms Schollum and MSD.

[27] Under s 128(2) of the Act In Residence must be ordered to pay at least three month's lost wages. This is not a case where the discretion to award a greater sum should be

exercised, due to the uncertainty over whether Ms Schollum's job would have continued if the company had undertaken a proper procedure.

[28] There is no suggestion that Ms Schollum contributed to the situation leading to her redundancy. In Residence is to pay Ms Schollum within 28 days of the date of this determination \$7,800 gross lost wages, being 13 weeks at \$600 gross a week, as a remedy for her grievance.

Compensation

[29] In Residence's sudden announcement shocked Ms Schollum. It was distressing to be informed of her redundancy when she had her children in the office. One asked if this was where she worked, shortly before Ms Schollum had to take down their art work from around her desk. She had to pack up her personal belongings in front of them and colleagues. Ms Schollum felt mortified, stunned and humiliated. She tried to put on a brave face but felt devastated.

[30] Longer term Ms Schollum felt embarrassed and rejected which negatively impacted on her self-confidence, leaving her having low moods and feeling lonely. It got to the point where she needed counselling. She had trouble sleeping.

[31] In Residence is to pay Ms Schollum within 28 days of the date of this determination \$17,500 as compensation for humiliation, loss of dignity and injury to feelings.

Costs

[32] As Ms Schollum has been successful, she is entitled to a contribution by In Residence towards her costs of representation. The parties are encouraged to reach an agreement on costs. If they are unable to do so Ms Schollum shall have 21 days from the date of this determination to file a memorandum seeking costs. In Residence will then have 14 days from receipt to file its memorandum in reply.

[33] The starting point for costs is likely to be the Authority's 'daily tariff' with particular circumstances or factors possibly requiring an adjustment upwards or downwards. The notional daily tariff for a full one day investigation meeting is \$4,500 although this matter took less than half a day.

Nicola Craig
Member of the Employment Relations Authority