

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA 70
5371658

BETWEEN BARBARA TAUREREWA
 Applicant

A N D KAY COBB
 Respondent

Member of Authority: Michele Ryan

Representatives: Graeme Ogilvie, Advocate for Applicant
 The Respondent in person

Investigation Meeting: 7 March 2013

Submissions received On the day of the investigation

Date of Determination: 12 June 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ms Barbara Taurerewa claims she was employed by Ms Kay Cobb following an election to transfer her employment pursuant to s. 69I, Subpart 1 of Part 6A of the Employment Relations Act (colloquially known as the “vulnerable worker legislation”). Ms Taurerewa says that Ms Cobb did not provide her with work and wages and that she was dismissed unjustifiably.

[2] Ms Cobb opposes Ms Taurerewa’s application and denies that Ms Taurerewa was employed by her.

Background

[3] Prior to 1 March 2012 Ms Taurerewa was employed by Total Property Services (Wellington) Limited (TPS) for 18 hours per week to perform cleaning services for Waiwhetu Medical Centre Group Limited (the Medical Centre).

[4] On 8 February 2012 TPS was given notice by the Medical Centre that it was cancelling the service agreement between it and TPS and that the agreement would conclude on 29 February 2012.

[5] On 17 February 2012 TPS's Customer Services Manager wrote to the Medical Centre and asked who its provider of cleaning services would be, and for contact details so that the staff employed by TPS who worked at the Medical Centre could, if they elected, transfer to the new provider.

[6] On 24 February 2012 the Medical Centre advised TPS that Ms Cobb, a sole owner/ operator, would begin performing the cleaning required as of 1 March 2012, and sent Ms Cobb's contact details.

[7] Ms Taurerewa says that when she was advised that the contract between TPS and the Medical Centre was about to be cancelled and of her right to transfer to the subsequent contractor, she agreed to do so, but says she did not fully understand the relevant law and its implications at that stage.

[8] On 27 February 2012 TPS wrote to Ms Cobb and advised the following:

Total Property Services (Wellington) Limited has recently been advised by our client [the Medical Centre] that they have entered into arrangements with yourself for the cleaning contract at the [Medical Centre] effective from 01 March 2012.

Under Part 6A of the Employment Relations Act 2000, some of our employees who provide services currently at the [Medical Centre] are "vulnerable" employees and as such, their employment is protected.

The legislation states that certain categories of workers listed under Schedule 1A of the Act have the right to elect to transfer their employment to the new contractor (in this case yourself). In doing so, they will be afforded the same terms and conditions and their employment will be deemed continuous. This means that the new employer inherits the employees, accumulated annual leave, sick leave, alternative holidays, any long service leave due and any other service – related entitlements as per their employment agreements and the attached values. These provisions extend to employees of subcontractors providing services to your business at this contract.

As a consequence we have advised our staff of this impending change and given them the opportunity to elect to transfer and as a result one of our staff has elected to transfer over under this legislation. Our employee's name is Barbara Taurerewa and we attach to this letter details of her current employment situation as it stands with us.

...

[9] Ms Cobb responded on the same day by email and stated:

As I will be doing the cleaning myself, I will not be employing anyone therefore, I do not need to meet with Barbara.

I am familiar with the legislation but nevertheless I double checked with the Labour Department and they have confirmed that you will either have to find her another position (which should not be hard as you have been advertising for staff) or, make her redundant.

[10] Ms Taurerewa says that Ms Cobb never contacted or spoke to her about her transfer of employment but submits that by operation of law she was employed by Ms Cobb on 1 March 2012 and that she was unjustifiably dismissed.

[11] Ms Cobb says she had heard that Ms Taurerewa had obtained work elsewhere and did not think she was liable to employ her.

The issues

[12] The issues for the Authority to determine are: whether Ms Taurerewa employed by Ms Cobb and if so was she unjustifiably dismissed?

Ms Cobb's position

[13] Ms Cobb's evidence is that prior to March 2012 she carried out the cleaning of three small organisations within the same premises as the Medical Centre, and that she performed the work herself.

[14] Ms Cobb says that following encouragement from a nurse employed at the Medical Centre, in early 2012 she entered into a commercial agreement to provide cleaning services to the Medical Centre. She says she is a sole trader and personally performs the work pursuant to the agreement between the Medical Centre and herself. Ms Cobb says there is not enough work for both herself and Ms Taurerewa at the Medical Centre, and it was never anticipated by her that she would be obliged to employ someone else to perform the cleaning work required.

[15] Ms Cobb says that on 27 February 2012 when she received advice from TPS that Ms Taurerewa had elected to transfer to her employ, she contacted a call centre of the then Department of Labour and received advice that the provisions of Part 6A did not apply to her as she is a sole owner/operator. Unfortunately Ms Cobb was not able to verify the advice she had been given and was unable to point to any aspect of the legislation which would allow her an exemption from the relevant provisions.

The legislation

[16] Part 6A of the Employment Relations Act provides varying levels of protection to employees whose employment is affected by restructuring. The level of protection provided to an employee is dependent on the type of work the employee is engaged to perform and where the work is performed.

[17] A high level of protection is given to employees identified in schedule 1A of the Act and includes employees who provide cleaning services. These employees are often referred to as “vulnerable employees”. Section 69B of subpart 1 sets out four different types of restructuring that may affect vulnerable employees including situations which result in (a) contracting in, (b) contracting out, (c) subsequent contracting, or (d) sale or transference of an employer’s business (or part of it) to another person.

[18] Subpart 1 of Part 6A applies to a vulnerable employee if, as a result of one or more of the above types of restructuring, the employee will no longer be required by his or her employer to perform the work performed by the employee, and the work performed by the employee (or work that is substantially similar) is to be performed by or on behalf of another person¹. In these circumstances an employee has a right to elect to transfer to work for the other person² on the same terms and conditions he or she had with the original employer³ and become an employee of the other person⁴.

[19] Section 69C(4) describes a situation which, for the purposes of the Act, defines the circumstances of “subsequent contracting”. I have reproduced the section and applied it to the parties in this dispute as follows:

¹ Section 69F(1)

² Section 69I(1)

³ Section 69I(2)(b)

⁴ Section 69(2)(a)

- (a) person A (in this case, the Medical Centre) has an agreement with person B (in this case, TPS) under which person B/TPS performs work as an independent contractor for person A/the Medical Centre; and
- (b) the work or some of the work is actually performed by employees (in this case Ms Taurerewa) of person B/TPS; and
- (c) the agreement...under which person B/TPS performs the work...is terminated; and
- (d) person A/the Medical Centre enters into an agreement with another person (person C, in this case Ms Cobb) under which person C/Ms Cobb is to perform the work as an independent contractor for person A/the Medical Centre.

[20] There is no dispute that Ms Taurerewa was an employee who is protected by Subpart 1 of the Act.

[21] As a result of restructuring, the work performed by Ms Taurerewa at the Medical Centre was subsequently contracted to Ms Cobb, and it is clear from the evidence that Ms Taurerewa elected to transfer to the employ of subsequent contractor, Ms Cobb.

[22] I accept Ms Cobb's evidence that she had no intention to employ Ms Taurerewa (or anyone else) to perform the work required at the Medical Centre, however s.69I(3) of the Employment Relations Act materially states:

To avoid doubt,-

...

(b) a person becomes the new employer of an employee who elects to transfer to the new employer whether or not the new employer-

- (i) Has, or intends to have, employees performing the type of work (or work that is substantially similar) to the work performed by the employee who has elected to transfer to the employer;

...

[23] I find that by operation of the provisions contained at subpart 1 of Part 6A of the Employment Relations Act, Ms Taurerewa became an employee of Ms Cobb's on 1 March 2012.

The dismissal

[24] The law requires an employer (in this case Ms Cobb) to justify a decision to dismiss an employee⁵. The Authority is required to assess whether the employer's actions in dismissing an employee is what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[25] Section 103A(3) of the Act sets out minimum requirements of procedural fairness which are required to be considered as part of the Authority's assessment. In this matter the Authority must consider:

- a. the resources available to Ms Cobb and whether Ms Cobb sufficiently investigated the allegations against the employee before dismissing or taking actions;
- b. whether Ms Cobb raised the concerns that it had with Ms Taurerewa before dismissing;
- c. whether Ms Cobb gave Ms Taurerewa a reasonable opportunity to respond to the employer's concerns before dismissing;
- d. whether Ms Cobb genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing.

[26] The Authority may also consider any other factors it thinks appropriate⁶ however the Authority must not determine a dismissal or an action to be unjustifiable solely because of defects in the process taken by an employer if the defects were minor and did not result in the employee being treated unfairly⁷.

[27] I conclude that Ms Cobb's failure to accept the statutory imposed employment relationship was a repudiation of Ms Taurerewa's employment agreement. Ms Taurerewa was effectively dismissed.

[28] Further, Ms Cobb's omission to engage in any kind of discussion with Ms Taurerewa as regards the arrangements with the Medical Centre falls below statutory required minimum standards of procedural fairness.

[29] Ms Cobb says Part 6A is morally wrong and says the legislation should not apply to a sole owner/operator such as herself. I accept Ms Cobb's perceived sense of

⁵ Section 103A

⁶ Section 103A(4) of the Act.

⁷ Section 103A(5) of the Act.

unfairness and recognise that her resources are extremely limited. However the Authority is required to apply the law as it is enacted. A lack of knowledge or understanding by Ms Cobb as to her obligations pursuant to the Employment Relations Act and/or an objection to the way the provisions of Part 6A operate, do not excuse or justify a failure to comply with it.

[30] Ms Taurerewa has a personal grievance claim for an unjustified dismissal.

Remedies for the personal grievance

[31] Ms Taurerewa claims reimbursement of \$3,276 (three months' wages) plus holiday pay with that period, and \$3,000 compensation for hurt and humiliation.

Reimbursement for lost wages

[32] Ms Taurerewa has claimed for 13 weeks lost wages plus 8% holiday pay applicable to the payment for lost wages.

[33] Section 128 provides that where the Authority determines that an employee has a personal grievance the Authority must order the employer to pay to the employee the lesser of the sum equal to the lost remuneration or three months' ordinary time remuneration.

[34] Although Ms Taurerewa did not provide documentary evidence in support, I am satisfied that she actively looked for alternative work with other cleaning service providers including Spotless Services, and that she canvassed newspapers and the internet for vacant positions. She has since become a student.

[35] I order Ms Cobb to pay Ms Taurerewa \$3,276.00, (gross) being the sum equal to 13 weeks lost wages at the rate of \$14.00 per hour for 18 hours of work per week. I also order a further payment of \$262.08⁸ (gross) as compensation for loss of the benefit of holiday pay associated with three months' work, which Ms Taurerewa might reasonably have expected to obtain if the personal grievance has not arisen⁹.

Compensation

[36] Ms Taurerewa claims \$3,000 as compensation for humiliation, loss of dignity and injury to feelings. She provided persuasive evidence of the negative effect the

⁸ Being 8% of \$3,276.00; the sum equal to three months' wages for Ms Taurerewa.

⁹ Pursuant to s. 123(1)(c)(ii)

dismissal had on her, including embarrassment at becoming financially dependent on her family and that she was required to return to live at her mother's home because she was unable to pay rent. I accept her claim and award \$3,000 as compensation pursuant to s. 123(1)(c)(i) of the Act.

[37] I do not consider Ms Taurerewa in any way contributed to the situation that led to her unjustified dismissal and this is not a case which requires a reduction in remedies as a consequence.

Costs

[38] Costs are reserved.

Summary of Orders

[39] Ms Cobb is to pay Ms Taurerewa the following:

- **\$3,000** as compensation pursuant to s. 123(1)(c)(i) of the Employment Relations Act: and
- **\$3,276.00** (gross) as reimbursement for 13 weeks lost wages pursuant to s. 128(2); and
- **\$262.08** (gross) as compensation for the loss of holiday pay associated with three months' work pursuant to s. 123(1)(c)(ii).

Michele Ryan
Member of the Employment Relations Authority