

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 40
5464145

BETWEEN SHERYL ANNE WATSON
Applicant

A N D WAITAKERE PLAYHOUSE
THEATRE TRUST
Respondent

Member of Authority: James Crichton

Representatives: Applicant in person
Mark Kamphorst, Advocate for the Respondent

Investigation Meeting: 21 November 2014 at Auckland

Date of Determination: 9 February 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Watson) alleges that she was unjustifiably dismissed from her employment as a part time theatre manager by the respondent (the Trust). That claim is resisted by the Trust on the basis that the termination of the employment was for redundancy, that the redundancy was genuine and that the process that the employer used in effecting the termination of the employment, including the use of consultation, was the process that a fair and reasonable employer could use in the particular circumstances of the case.

[2] The Trust also alleges that Ms Watson has, in complaining about the termination of her employment for redundancy, raised a number of spurious matters and it says that her application ought to be dismissed as vexatious on the basis of clause 12A of Schedule 2 to the Employment Relations Act 2000 (the Act).

[3] I indicated to the parties in the preparation for the investigation meeting that I did not think this was a case which ought to be progressed in terms of the clause 12A

procedure and the proper course was to deal with it as a straightforward personal grievance claim in the normal way.

[4] At the commencement of the investigation meeting, I also was at pains to set out for the benefit of the parties the relevant law in case there was any misapprehension on the part of either party as to the legal position. In particular, I emphasised that employers were entitled to address inefficiencies in their operation by disestablishing positions and in consequence dismissing the occupants of those positions for redundancy.

[5] Moreover, while the law was that the Court or the Authority would not interfere with a legitimate business decision to disestablish a particular position for genuine commercial reasons, the Court or the Authority could and would inquire into what the basis of that “*genuineness*” is. Put another way, it is not enough for an employer to simply assert that they had a genuine business reason for disestablishing a particular position; there must be evidence available for the Authority to inquire into which satisfies the Authority on reasonable grounds that the decision the employer took in the particular circumstances of the case was a decision that a fair and reasonable employer could take in those circumstances. In other words, the test for justification at law applied in exactly the same way as it applies in every other kind of decision to terminate the employment of an employee.

[6] Ms Watson commenced employment as a part time theatre manager in March of 2004. In addition, she had another role in the Trust as a caretaker/custodian of the Trust premises. In that latter connection, there was disputation between the parties as to whether the role was one of employment or a contractual role.

[7] It is apparent on the evidence that there were changes in the hourly rate that pertained to the theatre manager role, changes in the hours of work as well, and that there was no written employment agreement in the early years of the engagement.

[8] In March 2013, Ms Beverley Dixon resigned as chairperson of the Trust and was replaced by Mr Stan Henshaw. The evidence is that Ms Watson had a good relationship with Ms Dixon but a rather more uncertain relationship with Mr Henshaw. Certainly Ms Watson’s evidence is that Mr Henshaw effectively had it in for her and throughout her evidence to the Authority, it is clear that she personalised the issue.

[9] For his part, Mr Henshaw denied there was any personal animosity between him and Ms Watson, maintained that he had had a good working relationship with her until the restructuring proposal was under consideration, and maintained that Ms Watson was good at her job and that he would gladly have had her continue in it if funds had allowed of that possibility.

[10] It is true that about the time that Mr Henshaw became chair of the Trust, the Trust was forced to address the loss that had been sustained in its operations in the previous year's activity. A decision was taken to investigate how the Trust could reduce expenditure because of the Trust's conviction that its sources of income were so uncertain as to not be capable of being relied upon. Those sources effectively were grants applications from various entities including in particular local authority grants (the Trust having been set up initially by the Waitakere City Council) and by revenue from theatre hires.

[11] The evidence discloses that, having identified the deficit in May 2013, the Board of the Trust spent the period from May through to August of 2013 considering what it described as "*various options/scenarios*" and then in August 2013 the tipping point was reached when the Trust obtained legal advice which suggested that trustees might be personally liable if they had not acted to address the losses in some way.

[12] Accordingly, a restructure proposal was initiated, the Trust engaged EMA to assist it in the management of the process, and a first meeting with Ms Watson was scheduled for 5 September 2013.

[13] The documentation generated by the Trust in respect to its consultation process is before the Authority and I have reviewed it. The initial letter initiating the 5 September 2013 meeting is in a standard form and conveys all of the information I would expect in a letter of that kind.

[14] Amongst other things, it offers to Ms Watson an outline of the Trust's financial position, foreshadows a proposed restructure, notes that a consequence of that restructure may be the disestablishment of her position, invites her to bring a support person and seeks to conduct the process confidentially.

[15] Ms Watson complains that she was unable to obtain accurate financial information about the Trust's true position and she asserts that the Trust's treasurer was not keeping accurate records.

[16] In any event, there were two meetings between Ms Watson and the Trust, the second of which took place on 17 September 2013.

[17] Subsequently, the Trust offered to meet with Ms Watson again putting up the chair (Mr Henshaw) and the EMA consultant as the team that was prepared to meet with Ms Watson but she declined the opportunity to meet again with that duo, insisting that she should have had the opportunity to meet with the full Board.

[18] Ms Watson made a final offer on 25 November 2013 to reduce her hours of work down to within the amount of the grant paid to the Trust by the Auckland Council but that offer was not accepted by the Trust and a letter from the Trust dated 12 November 2013 conveyed a preliminary decision that the proposed restructure would proceed, the effect of which was that both of Ms Watson's positions, the theatre manager role and the caretaker role, would disappear.

[19] Importantly, for our purposes, that letter also attached what it describes as "*a new set of accounts*". Amongst other things, that new information shows in graphical format the significant percentage of the Trust's expenditure that was paid to Ms Watson, either in her role as theatre manager or as custodian/caretaker. The letter also offered a further opportunity to meet but only with Mr Henshaw and the EMA consultant.

[20] Having considered Ms Watson's offer to reduce her hours and rejected that proposal, the Trust then confirmed its decision to terminate Ms Watson's two positions for redundancy and that decision was conveyed by letter dated 27 November 2013.

Issues

[21] There are two issues that I must determine in the present case. The first is whether Ms Watson has any personal grievance in respect to the termination of her employment for redundancy and the second is whether her subsidiary role as a caretaker/custodian was one of employment or a contractual role. The importance of the second issue is not academic; Ms Watson claims that she was an employee and accordingly is entitled to holiday pay for the period the law allows her to claim back.

Was Ms Watson unjustifiably dismissed?

[22] The essence of Ms Watson's claim is that she was constructively dismissed from her employment in a campaign waged against her by Mr Henshaw, the incoming chairperson of the Trust. I have not been persuaded by Ms Watson's claim in that regard. I am satisfied on the evidence I heard that this was a genuine redundancy, effected for proper commercial reasons, and undertaken in a business like fashion and in accordance with the law relating to consultation.

[23] I address first the question of genuineness. I am satisfied on the evidence before me that this was a genuine redundancy. I think the evidence discloses that Ms Watson's two roles at the Trust were between them, the Trust's largest single expense and I am also satisfied that the Trust's financial position, with the continuation of that costs impost, was unsustainable.

[24] Ms Watson makes a number of allegations about the Trust's support for its proposal but I have not found them sustainable. First, her allegation that Mr Henshaw was somehow out to get her may be her view but I do not think it is supported by the evidence. It is unfortunate that Mr Henshaw became the Trust chair at about the time that the Trust needed to address its financial position and that may have caused Ms Watson to think badly of Mr Henshaw, but I am satisfied that he was simply doing his job as chair of the Trust in addressing its financial circumstances.

[25] At the point that the result for the 2012 year became available to the trustees (May 2013), the deficit was \$39,000. I am satisfied that that figure is broadly accurate of the Trust's position at that time.

[26] What the Trust did next was spent three months looking at alternative scenarios. That is entirely proper and appropriate and precisely what one would expect of any good and fair employer.

[27] Having decided that the only thing they could reasonably do was to address the biggest single cost item, they commenced on a provisional restructuring plan. That necessitated meeting with Ms Watson and providing her with the information that the Trust had before it. I have already commented on the matters referred to in the letter asking Ms Watson to attend a consultation meeting.

[28] The restructure proposal itself, a written document prepared by the Trust, is before the Authority and was provided to Ms Watson. It adequately describes the proposal.

[29] The first meeting between the parties took place on 5 September 2013. Ms Watson has provided me with her record of that meeting. The meeting appears to traverse a wide range of matters about the fall off in income, which clearly precipitated the financial issue.

[30] I have already noted that Ms Watson complained about some of the financial information that the Trust relied upon and that position of hers was reiterated at the second meeting on 17 September 2013. Again, Ms Watson's notes of that meeting disclose a wide ranging discussion between the parties of the sort I would expect in a consultation environment.

[31] What the Trust did next is important because, rather than rely on the financial information it had itself advanced, it determined, after the second meeting with Ms Watson, that it needed to get "*independent financial advice ... in view of some of the issues raised by you [Ms Watson] ...*". Those words come from a letter from the Trust to Ms Watson dated 25 September 2013 and reflect the Trust's decision that some of the submissions that Ms Watson was making about the financial position warranted further inquiry. That is the decision of a good and fair employer acting prudently in a situation where a person's livelihood was in issue.

[32] Having obtained that further information, "*a new set of accounts (was) prepared*" and "*summary sheets of the financial data*" generated from that new set of financial accounts, and that material was provided to Ms Watson attached to the Trust's letter of 12 November 2013. That information includes a pie chart graph which discloses relatively dramatically how much of the Trust's expenditure is directed to one or other of Ms Watson's roles. Without in any way wishing to be scientific about it, I should have thought the combination of the two separate positions held by Ms Watson represented something around 40% of the Trust's expenses.

[33] That being the position, it is hardly surprising that the Trust did not feel able to accept Ms Watson's final proposal that she reduce her hours to within the figure of the grant received from the Auckland Council. Ms Watson protests that the effect of that proposal of hers ought to have been to put everything back into balance. This is

because she maintained in her evidence that the purpose of the Council grant was always to support the employment of a part time theatre manager and that therefore the salary of the manager ought to balance, roughly, the quantum of the grant.

[34] But that view of the grant's purpose was not accepted by the Trust and on the evidence I heard, while it may have been the original intention of the Waitakere City Council that that nexus between the salary of the theatre manager and the grant was established, as the Trust pointed out in its evidence, there is nothing in the terms of the grant that is now provided by the Auckland Council which requires it to do any particular thing with the grant moneys. It is simply a grant provided by the local authority to assist the work of the Trust in the community.

[35] The starting point for any consideration about the genuineness of a redundancy remains the Court of Appeal decision in *GN Hale & Son Ltd v. Wellington Caretakers etc IUOW* [1990] 2 NZILR 1079.

[36] As I observed in a previous determination of the Authority, there are two central propositions that can be drawn from *Hale*. The first is that an employer such as the Trust is entitled to take costs out of its operation and an employee such as Ms Watson does not have the right of continuity of employment if the Trust is capable of operating more efficiently and effectively without her.

[37] A second proposition derived from *Hale* is that the Authority will not substitute its view for the view of the employer (in this case the Trust) as to how the Trust should be operated except that it is not sufficient for an employer such as the Trust to simply assert that it made a redundancy decision for "*genuine commercial reasons*".

[38] As the Chief Judge said in *Michael Rittson-Thomas t/a Totara Hills Farm v. Hamish Davidson* [2013] NZEmpC 39, the Authority will need to be provided with sufficient evidence of the basis of the business decision made by the employer in order for the Authority to conclude that the decision that the employer made, was one of the decisions that a fair and reasonable employer could have made in the particular circumstances of the case.

[39] Applying *Rittson-Thomas* then, I am satisfied on the evidence before me that the decision that the Trust made in respect of the position occupied by Ms Watson

was one of the decisions that a fair and reasonable employer could have made in the particular circumstances of the case: s.103A of the Act.

[40] I am particularly drawn to that conclusion because I have not been persuaded by Ms Watson's claim that Mr Henshaw was motivated by malice, the evidence simply not supporting that contention, and I consider that the Trust acted very properly in seeking further and better financial particulars about its own circumstances when it was confronted with Ms Watson's various objections to the financial information that it provided to her as part of the consultation process.

[41] Had the Trust not chosen to revisit the financial information it was relying upon, as a consequence of Ms Watson's complaints about it, I might well have been persuaded that Ms Watson's objections had merit because she was a longstanding servant of the Trust, had worked for the Trust including having a role in its financial affairs, and an unwillingness to consider what she said by way of rebuttal might have placed the balance more in her favour in the assessment of whether the information to support the genuineness of the redundancy was there or not. But because the Trust very properly reflected on what it was told during the consultation process and sought further and better particulars about its own information, I am satisfied that revised information can in fact be relied upon.

[42] It follows from that conclusion that Ms Watson has no personal grievance in respect to the termination of her employment.

Was Ms Watson a contractor or an employee in her role as caretaker/custodian?

[43] I accept without reservation the Trust's claim that this matter was not raised by Ms Watson directly in her Statement of Problem except very obliquely, and that it only developed a life of its own as part of the investigation process undertaken by the Authority. I also accept that because the Trust had attended the investigation meeting in good faith to engage about Ms Watson's personal grievance, it was not expecting to have to deal with questions from me about the nature of Ms Watson's engagement in regard to the nature of her engagement in the secondary role.

[44] However, the matter was raised, tangentially by Ms Watson and I considered I was duty bound to investigate it. I asked questions of the secretary/treasurer of the Trust at the investigation meeting and I understood her to tell me that, while the Trust had long maintained that the secondary relationship was a contractual rather than an

employment one, Ms Watson was being treated for the custodian/caretaker role as if it were secondary employment.

[45] That evidence is simply not right; I have now had put before me documents from the Trust including the original wage and time records and it is perfectly clear that Ms Watson is treated for tax purposes in relation to the secondary role on a withholding tax basis.

[46] That supports the Trust's evidence that Ms Watson was a contractor, or perhaps, more accurately, does not support Ms Watson's claim she was an employee. Ms Watson was paid separately for those separate engagements as and when they occurred and in that regard, her situation was analogous to the position of other folk who provided services such as the lighting technician who worked during performances.

[47] It seems to me that there is no evidence at all that the parties ever discussed any arrangement of employment when the engagement commenced and it is difficult to see any basis on which Ms Watson can now claim this was also a relationship of employment.

[48] As the Trust correctly contends, even if there were a finding this was an employment relationship, on the face of it, it could only have been a casual relationship and therefore holiday pay would have been included in the hourly rate and would not be capable of being carried forward in the way that Ms Watson proposes.

[49] I am particularly drawn to the conclusion that this is a contractual relationship by the fact that the only kind of employment that could reasonably be contemplated on these facts is a casual employment and there is just no evidence of the sort of paper trail I would have expected for such a relationship; indeed the employer's records suggest strongly this was a contractual engagement on an as and when required basis.

[50] If this secondary role were a relationship of employment, it can only have been a casual employment because of the nature of the engagement, occasional jobs for the duration of a hire of the theatre, and if a casual engagement, then holiday pay would have been included in the hourly rate. There is no evidence before the Authority that the parties ever discussed this obvious point and in the absence of that,

I incline to the view this was a contractual role, with a fixed hourly rate payable, as set out in the employment agreement, subject to withholding tax.

[51] Put another way, it seems to me that even if I had concluded that this secondary role was one of employment, the only logical kind of employment that these facts could sustain was a casual employment, where each engagement was discrete within itself and included all legal entitlements including holiday pay paid at the time. On that basis, even if I am mistaken in my conclusion about the real nature of the relationship, there would be no further entitlement to holiday pay because it had been included in the hourly rate already paid.

[52] It is apparent from the Trust's records that the work performed by Ms Watson in her secondary role was occasional and more or less unpredictable, based as it was on the occasional hire of the theatre by outside parties. While it is true the secondary role is referred to in Ms Watson's employment agreement, that does not assist because the reference is no more than a passing reference and in any event, appears to state an all-inclusive rate to be differentiated from the payment of salary.

[53] The matter is further confused by the fact that it seems on the evidence that there was a period when Ms Watson claimed holiday pay on a portion of these earnings and, for whatever reason, the Trust paid that, but I do not think that the confusion of the parties about the status of the relationship ought to deflect me from concluding that, on the evidence before me, the better view is that this secondary role was never an employment relationship at all and was always a contractual role.

Determination

[54] For reasons that I have advanced in this determination, I am satisfied that Ms Watson does not have a personal grievance by reason of having been unjustifiably dismissed for redundancy and is not owed holiday pay because I am not satisfied that she was an employee for the secondary role that she performed for the Trust.

Costs

[55] While the Trust has been completely successful and will have incurred costs in defending Ms Watson's various claims, and therefore in principle is entitled to a contribution to its costs from Ms Watson, this is a case where Ms Watson, although

unsuccessful, had a genuine view about the way she had been treated and I would encourage the Trust to consider not making a claim against Ms Watson for costs.

[56] However, if the Trust wishes to pursue costs and is unable to get an agreement with Ms Watson about a contribution to those costs, then it can file an application for the Authority to fix costs, providing a copy to Ms Watson at the same time, and Ms Watson will then have 14 days from the date of receipt of the claim for costs in order to file her submissions in response.

[57] I will then fix costs on the papers.

James Crichton
Member of the Employment Relations Authority