

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2022] NZERA 578
3137902

BETWEEN SYLVIA WELLS
AND CASHMERE CLUB INC

Member of Authority: Antoinette Baker
Representatives: Paul Matthews, advocate for the Applicant
Benjamin John Austin for the Respondent
Investigation Meeting: 20 July 2022
Submissions received: 25 August 2022 from the Applicant
Determination: 7 November 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Wells was employed at a chartered club (the club) operated by the respondent (CC). She claims that CC unjustifiably disadvantaged her in her employment when it suddenly stopped offering her work; and that it unjustifiably dismissed her in a later redundancy that was not genuine.

[2] CC denies both claims.

[3] Ms Wells claims compensation, lost earnings after termination of her employment and costs.

The Authority's investigation

[4] For the Authority's investigation witness statements were lodged by the applicant and her son, Mr Wells; by Mr Austin a board member of the CC and Ms Atkins, a manager employed by the CC. At the investigation meeting all witnesses were heard from. Time was given after the investigation meeting for the parties to provide further evidence of payslips and rosters because a full set was not provided. Submissions were also timetabled. The applicant provided some further payslips and her representative provided written submissions. The CC did not provide anything further. I have now determined this matter based on the evidence before me.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[6] The issues are:

- (a) What was Ms Wells employed to do by CC?
- (b) Was Ms Wells disadvantaged in her employment when CC removed her from the bar roster?
- (c) Did CC unjustifiably dismiss Ms Wells by way of a redundancy?
- (d) What if any compensation under s123(1)(c)(i) of the Act is to be ordered?
- (e) What if any lost earnings under s 123(1)(b) of the Act are to be ordered?
- (f) Should any remedies be reduced for blameworthy conduct by the applicant that contributed to the situation giving rise to the grievance(s)?

- (g) Should either party contribute to the other party's costs?

Background to the employment relationship problem

[7] In early 2019, Ms Wells was employed by CC as a courtesy coach driver transporting club members to and from the club and their homes. Ms Wells also assisted with bar duties although the extent of these duties is in dispute. Some short time after she commenced in a casual capacity, she took over the role of a coach driver who had left. Her hours became more regular, generally two evening shifts working an average of 16 hours per week.

[8] Ms Wells recalls signing an individual employment agreement (IEA) around the time her role became permanent in May 2019. She says the IEA reflected her permanent role as coach driver and bar person. Ms Wells asked for a copy of her employment agreement when this matter arose. CC has not been able to find or produce an IEA for Ms Wells' employment.

[9] Around the time that New Zealand went into a 'level 4' lockdown for COVID-19 in March 2020 (the lockdown) the CC board took over the operational running of the club. Mr Austin, a voluntary board member, was actively involved in analysing and monitoring the financial position of CC at this time which included staffing. He describes financial concerns.

[10] When New Zealand entered the lockdown, CC closed the club and reopened again on 21 May 2020 albeit with restrictions set by the New Zealand Government. CC employees, including Ms Wells, returned a week before the planned re-opening and worked in various roles to get the club ready to open.

[11] When the club reopened the courtesy coach service did not resume but Ms Wells worked in various roles including tasks connected with the entry of persons into the club. After some weeks she began doing shifts in the bar and appeared on the bar rosters.

[12] In late July 2020 Ms Wells discovered through her son (who also worked at the club on the bar) that she was no longer appearing on the bar roster. Ms Wells questioned this. On 24 July 2020 Mr Austin responded to say there was a new roster system which is just for the courtesy coach team and that it would be managed by him and not the beverage manager, Ms Atkins, who had previously managed a combined roster. Mr Austin acknowledged the courtesy coach staff had historically been on the same roster and if he could not give Ms Wells work because the coach was not yet running again, she would be paid with the use of the Government's COVID-19 wage subsidy. Ms Wells challenged Mr Austin in an email that her employment included bar work. She said her IEA would clarify this. Mr Austin responded that her employment was not being changed and he could not find her IEA suggesting that if she had signed something she may have her own copy.

[13] The coach service did not resume during the remainder of Ms Wells' employment. Mr Austin gave evidence that it has not resumed at all. Ms Wells did not return to work at CC after Mr Austin communicated that she was no longer on the bar roster. Her last shift was on 25 July 2022. She continued to be paid by CC for a 16-hour average week, the average weekly hours she worked before the lockdown.

[14] Ms Wells raised a personal grievance against CC in a letter dated 21 August 2020 which included her claim that she was employed both as a coach driver and a bar person and that by no longer offering her work in the bar meant a unilateral change to her employment. She raised that this amounted to an unlawful suspension, and she asked again for her IEA to be provided.

[15] On 3 September 2020 CC wrote to Ms Wells and explained that to resume the coach service would not be economically viable (redundancy proposal). It sought feedback from Ms Wells and the one other coach driver. Ms Wells provided feedback through her representative. After receiving Ms Wells' feedback Mr Austin emailed that Ms Wells had not provided any

substantive feedback to consider, and communicated CC's decision to make the coach driver roles redundant, one of which was Ms Wells' role.

[16] Ms Wells raised a second personal grievance in a letter dated 17 September 2020 saying that she believed the redundancy was not genuine because her feedback had not been considered, and because she believed she was being personally singled out due to various events that included interactions she had with the CC beverage manager, Ms Atkins who had previously been the payroll clerk at the club.

What was Ms Wells employed to do by CC?

Casual or permanent?

[17] Ms Well's evidence is that she started in a casual capacity driving the courtesy coach and helping in the bar. The payslips from 2019 dated 6 February and 13 March respectively show payments for 'coach' shifts. The payslip dated 20 March 2019 shows payment for a 4-hour shift on the 'bar'. The payslip evidence supports Ms Wells description of her initial time working at CC.

[18] I find it likely that Ms Wells is correct when she says that she signed an IEA around May 2019 to reflect that the then manager had by this time considered she had become permanent after initially being 'casual.' The payslips support that this change occurred in that an inclusive holiday pay rate ceased, and subsequent pay slips accrue annual holiday leave consistent with a permanent role.¹

¹ Section 28 Holidays Act 2003 restricts the payment of pay as you go holiday pay for those with a regular working pattern.

[19] Payslips for 2019 into the beginning of 2020 show a pattern of Thursdays and Sundays with small variation. This is consistent with Ms Wells evidence that she moved to a permanent role with what she describes as “set days”.

[20] Accordingly, I find that except for the very early part of her employment Ms Wells was likely permanent part time until the March 2020 lockdown intervened. After the lockdown, I find it likely that while I have not been provided with all rosters and payslips for this period, the IRD earnings, together with two rosters and a payslip support Ms Wells’ evidence that she was working longer hours and additional days than she was before the lockdown. I find this further supports her employment continuing as permanent rather than intermittent irregular as may be expected with casual as-and-when-required employment.

Coach driver or coach driver and bar person?

[21] CC says Ms Wells’ role was courtesy coach driver and when there were no scheduled rides she cleared and cleaned glasses, a situation “common amongst all Courtesy Coach Drivers within the Club environment.”² CC says it completed a ‘review’ of rosters and payslips for “every month of Sylvia’s employment” to conclude that “her role was solely a courtesy coach driver”³. CC provided a selection of payslips and rosters rather than for the whole set that it says it reviewed. There was no indication on the set provided by CC that Ms Wells was labelled other than ‘coach’ or ‘driver’.

[22] Ms Wells was able to provide me with some payslips and rosters that filled some of the gaps in CC’s evidence. The following evidence provides support that Ms Wells was working at the club by performing bar duties beyond those contended by CC:

² Statement in reply 3 March 2021 paragraph 2 d.

³ Statement in reply 3 March 2021 paragraphs 3 b. and 3 c.

- a. As already noted above, Ms Wells worked a bar shift in March 2019 consistent with Mr Wells saying he was asked to train his mother to work in the bar at the time.
- b. Ms Wells worked bar shifts across the periods including Easter and Anzac Day in 2019 (Easter Anzac payslips). This is consistent with Ms Wells' evidence that she performed bar duties before the lockdown.
- c. Ms Wells and Mr Wells gave evidence that Ms Wells had a till log in to serve in the bar.
- d. Ms Wells was invited by email by a previous manager to complete 'Servewise Training' which even if (as Mr Austin says) was offered to all staff would have been relevant to bar service.
- e. Ms Wells shows as 'required' for work on a roster under 'bar staff' to work 18,19,20,21 June 2020 to start at 4.00pm; for 25 June at 5.00pm start; for 26, 27, 28 June 2020 all for 4.00pm start. I have no payslips to match these rosters and these rosters were provided by Ms Wells in her evidence.
- f. The payslip dated 22 July 2020 when the coach was clearly not operating shows Ms Wells paid for a total of 21.5 hours across 16, 17, 18, 19 July 2020 against a label 'coach' and for 16,17,18 July 2020 she is shown on a bar roster as required to work 4.00pm to 10.00pm shifts, time frames consistent with bar work. Ms Wells' evidence is that she was in fact working on the bar for these shifts despite the label 'coach' which I accept because this is consistent with the courtesy coach not running at the time.
- g. The other courtesy coach driver did not serve behind the bar before or after the lockdown. This supports Ms Wells' role as something different to that person who just drove the courtesy coach and may well have been categorised in the way that Ms Wells was categorised in Mr Austin's communications when explaining why she was taken off the bar roster.

[23] Weighing the above I find that Ms Wells was employed by CC in a role that was predominantly courtesy coach driver but that she was also employed to serve behind the bar which was more than just collecting and cleaning glasses as CC contends is the usual adjunct to a driver's duties in a chartered club environment. The evidence supports that there was more regular bar work duties for Ms Wells after the lockdown but given the apparent fluidity of the situation, I accept Ms Wells' oral evidence that she regularly jumped in to help behind the bar during times throughout her employment at the club. I found her evidence and explanations about this straightforward and plausible.

[24] I find that after the lockdown Ms Wells' bar duties had developed to the extent that she had an expectation of work being offered to her in the bar well beyond what could reasonably be described as incidental collecting and cleaning glasses.

[25] Accordingly, I am satisfied that Ms Wells role was not solely a courtesy coach driver throughout the whole period of her employment with CC but after the initial weeks of employment in a permanent part time role bar she undertook full bar duties as needed and or as required by the CC roster.

Was Ms Wells disadvantaged in her employment when CC removed her from the bar roster?

Was Ms Wells suspended from her employment?

[26] It is submitted for Ms Wells that CC suspended her when Mr Austin removed her from the bar roster. I agree with this submission. This is because I have already found that her role included bar work which had increased after the lockdown. I accept that to suddenly stop Ms Wells being offered bar work was a suspension from those duties.

[27] Accordingly, I accept that Ms Wells was suspended from her employment when she was taken off the bar roster.

Was Ms Wells disadvantaged by the suspension?

[28] An employer has a duty to act in good faith under s 4 of the Act and to follow principles of natural justice before making a decision that adversely affects an employee. The Employment Court has held that “to justify suspension, an employer must have good reason to believe that the employee’s continued presence in the workplace will or may give rise to some other significant issue.”⁴

[29] Generally, an immediate suspension without consultation (for example about alternatives) would need to be based on circumstances where there is a high risk in leaving an employee working while something else like a disciplinary investigation occurred.⁵ I have no evidence that there was any type of high risk in having Ms Wells continue working on the bar that may reasonably support a suspension without consultation. In not consulting with Ms Wells, she lost the opportunity to have a discussion about the proposal to remove her from the bar roster and consider the reasons why and alternative options.

[30] I accept that after Ms Wells was suspended, she continued to be paid. CC says this means that she did not suffer a disadvantage.

[31] The Employment Court has held that there can be an adverse effect on an employee suspended on pay noting that the sudden expulsion from a workplace could on its own have an adverse effect on the employee.⁶

⁴ Singh v Sherildee Holdings Limited [2005] EmpC Auckland AC53/05 at [93].

⁵ Graham v Airways Corporation of New Zealand Ltd [2005] ERNZ 587

⁶ Booth v Big Kahuna Holdings Limited [2014] NZEmpC 134 at [60]

[32] I accept Ms Wells' evidence about how upset she was when she found out through Mr Wells (and not CC as her employer) that she was suddenly taken off the bar roster. She had to contact Mr Austin for an explanation. Mr Wells gave evidence that Ms Wells loved working at the club and had friends there. Ms Wells described working hard to get the club operating again after lockdown by undertaking various tasks. This supports that Ms Wells had a loyalty to the club if not to CC as well.

[33] That Ms Wells came to the conclusions she did when she was taken off the roster (whether or not these were correct) about ulterior motives for removing her from the bar roster is partly understandable in the void left by no real communication from her employer as to reasons and by the lack of consideration as to the reality of her employed role.

[34] Considering the above I find that CC unjustifiably suspended Ms Wells in such a way that she was disadvantaged in her employment. I return to the issue of a remedy below.

Did CC unjustifiably dismiss Ms Wells by way of a redundancy?

[35] Section 103A of the Act requires the Authority to assess whether an employer has shown that its decision to dismiss was justified based on what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. This includes asking whether the employer's substantive reasons were sufficient to justify the dismissal and whether the procedure the employer followed in making the decision was fair. Minor defects in the disciplinary procedure may not support a finding of unfair procedure if they have not had an unfair effect on the employee.

[36] The Court of Appeal⁷ has confirmed that employers need to justify making an employee redundant by showing the redundancy was genuine and based on business requirements.

[37] The Employment Court⁸ recently reiterated the established principles regarding redeployment which is based on an interface with s 4 and s 103A of the Act requiring a fair and reasonable employer to behave in a manner consistent with the statutory duty of good faith when undertaking a redundancy process. In *Gatiatullina* this included inquiring into the employee's role and discussing this with the employee in a situation where the proposed redundancy related to a role that had changed from when the employee was first employed and included overlaps and responsibilities.

[38] Section 4(1A)(c) of the Act requires an employer who is proposing to make a decision that will have an adverse effect on the continuation of an employee's employment to provide them with access to information relevant to the continuation of their employment and an opportunity to comment on this information.

Was the redundancy predetermined?

[39] When CC communicated the redundancy proposal to Ms Wells on 3 September 2020 she had not been offered work at the club since the end of July when she was taken off the bar roster. I have already found she was unjustifiably suspended during this time. The redundancy proposal came approximately four weeks after the suspension.

[40] CC says the two decisions were not connected but the decision to consider Ms Wells solely a courtesy coach driver had to be a precursor to then considering her role as purely a coach driver in the redundancy proposal from which CC then decided to disestablish Ms

⁷ *Grace Team Accounting Ltd v Brake* [2014] NZCA 541 at [85]

⁸ *Gatiatullina v Propellerhead Limited* [2021] NZEmpC 146

Wells' role and make her redundant. Ms Wells submits the decision to cease the coach service was already made in June before she was taken off the bar roster. I do not think this by itself supports a predetermination of the decision of redundancy.

[41] Ms Wells also submits that Ms Atkins was behind the redundancy, and it was retaliation because of various incidents including what Ms Wells alleged were reduced hours or giving her shifts she was not available for (Wednesdays) or due to a June 2020 incident relating to Ms Wells becoming angry and refusing to undertake raffles at a time that Ms Wells was also dealing with some other issues in her life. Mr Wells gave evidence that he believed Ms Atkins "for whatever reason suddenly had it in for Sylvia".

[42] The overall tenor of the claims that Ms Wells makes against Ms Atkins and some of the very personalised written evidence Ms Aitkens submitted about Ms Wells' son (presumably to discredit him as a witness supporting his mother's evidence) is consistent with two people (Ms Wells and Ms Atkins) working and socialising at a workplace and holding (for whatever reason or cause) a degree of animosity toward each other. This type of evidence is difficult if not impossible to unravel.

[43] However, having heard from both Mr Austin and Ms Atkins I do not accept that Ms Atkins was the decision maker for CC in terms of the decision to remove Ms Wells from the bar roster or the final decision to cease the courtesy coach service and then make Ms Wells redundant. This finding is also supported by Mr Austin's message to Ms Wells dated 25 July 2020 which includes that "Michelle [Ms Atkins] has been instructed to roll out a new roster system specifically for her bar staff team."

[44] Accordingly, by weighing the above I am not satisfied I have sufficient reliable evidence on which to find that CC's redundancy decision was predetermined based on retaliation or the timing of a decision to cease the courtesy coach service.

Financial reasons given for the redundancy proposal

[45] The redundancy proposal from CC to Ms Wells was based on two reasons: a \$50,000.00 financial drop in club revenue for a comparative period the previous year and the Government COVID-19 subsidy finishing.

[46] I accept Mr Austin's evidence that as a voluntary member of the board of CC with financial experience he had genuine concerns about the financial viability of continuing the courtesy coach service. The global pandemic and restrictions had likely placed pressures on CC's running of the club. Added to this I accept Mr Austin's explanation that there were already financial issues for the club before the lockdown that necessitated the board taking over the administration. However, I accept the submission for Ms Wells that it was difficult to see how making her role redundant [as opposed to the decision of ceasing the courtesy coach service] could have impacted on the financial issue of a loss of revenue for the previous month the year before when Ms Wells only earned less than \$2,000.00 earnings in a month. It was a reasonable question for Ms Wells to ask through her representative in response to the redundancy proposal and one that was not answered by CC.

[47] I find it likely that a business decision to cease the coach service could have been supported in the circumstances outlined by Mr Austin and it is not for me to question this. However, it seems unlikely that CC had sufficient reason to decide to make Ms Wells redundant as a follow on from this decision given as I have already found above CC had unreasonably decided her role was solely that of a coach driver. To this extent the outcome of CC's proposed redundancy process could have been different had CC effectively looked reasonably and carefully at Ms Wells role. This issue links with CC's duty to consider redeployment that I will now consider.

Was Ms Well's feedback genuinely considered before CC made a decision to make her role redundant including redeployment options?

[48] Ms Wells feedback to the redundancy proposal included her earlier expressed position that she was not just a coach driver. She further explained that she different from the other courtesy coach driver; that she had done bar shifts before the lockdown and then had been working in the bar after the lockdown; that she had previously asked for her individual employment agreement signed in May 2019 that would explain her roles; that other jobs were advertised (an events position was advertised on Facebook on 26 June 2020) and a new bar person had been employed in the bar since the lockdown. She included that she was "so versatile in my different roles that a full-time position could easily be created to serve the requirements the club needed."

[49] Mr Austin for CC responded to this feedback in a 16 September 2020 email: "As you have not provided any substantive feedback as requested in my letter dated 3 September 2020 the Club has decided to confirm the originally proposed decision to disestablish the Courtesy Coach Driver." Ms Well's says that Mr Austin further indicated to her representative that he thought her feedback was "slander". I accept this was likely the position that Mr Austin took and that there was a likelihood this related to Ms Wells' saying she took the redundancy proposal "personally" elaborating on how she felt she was being singled out due to her interactions with Ms Atkins.

[50] Even if some of Ms Wells' feedback included things that CC considered were not relevant, her feedback clearly raised substantive issues to the redundancy proposal. In dismissing Ms Wells' feedback to the redundancy proposal as not "substantive" I am satisfied that CC did not genuinely consider her feedback.

[51] I further find that CC failed significantly in the redundancy process by not genuinely considering redeployment roles for Ms Wells. She was already trained and working shifts in

the bar and CC had no issues with her work. The bar and the club continued to operate after Ms Wells was removed from the bar roster and after she was made redundant. I accept Ms Wells' evidence that someone was employed in the bar after the lockdown which shows me that the bar appeared not to be an area that was considered for redundancies and there were vacancies. Even if it could be said that had the courtesy coach resumed Ms Wells may have gone back to driving the coach and performing bar duties, I have already found those duties were more than just incidental. Either way the procedural defects here are substantive and are not tempered by an outcome that would have been redundancy in any event.

[52] Accordingly, I find that CC's decision to make Ms Wells redundant from its employment was not what a fair and reasonable employer could have done in all the circumstances at the time. I find that the redundancy resulted in an unjustified dismissal and will now consider the remedies sought.

Compensation under s123(1)(c)(i) of the Act

[53] While I have been asked to consider two grievances, I find that a global compensatory sum is appropriate. This is because my finding of an unjustified dismissal is linked to CC's decision to have unreasonably defined Ms Wells in late July 2019 as solely a courtesy coach driver and effectively create the situation where it felt justified to disestablish her role and her employment.

[54] I have already commented that there was a likely adverse effect on Ms Wells due to the suddenness and manner of the suspension. The same evidence supports the effect that the redundancy had on Ms Wells. Mr Wells gave evidence that he had to move back home to support his mother's decline in wellbeing. Ms Wells told me how much her long-term involvement and social interactions at the club meant to her. Mr Wells had started at the club as a young 'glassy' and worked his way up to working on the bar. I found his evidence straightforward and supports that Ms Wells had a dedication to the work she undertook at the

club. She remained at home after the suspension and struggled emotionally. She then faced an unfair redundancy process which repeated what was likely a real sense of not being listened to about the reality of her role in the context of an employer that could not provide as it is obliged to do a written employment agreement that may have assisted⁹. I accept that all of this understandably and likely had a significant emotional effect on Ms Wells.

[55] Accordingly, I find that an order of \$20,000.00 in compensation is appropriate.

Reimbursement of lost earnings under s123(1)(b) of the Act

[56] While I note that Ms Wells appeared worked longer bar duty hours after lockdown than her pre lockdown average of 16 hours per week she is seeking 5 weeks of wages, a total of \$1,520.00 gross. I find this is a reasonable amount to award to her considering some earnings after her employment ended at the club. I note that benefits are not considered in an assessment for lost earnings.

Should any remedies be reduced for blameworthy conduct by the applicant that contributed to the situation giving rise to the grievance(s)?

[57] I have already referred to the way I view the context that relates to what was Ms Wells' and Ms Atkins' work relationship. However, the evidence shows that Ms Wells was consistent in raising the issue that was at the heart of why I have found her grievance is made out being that she was not simply a courtesy coach driver during her period of employment. To this end I do not find that Ms Wells contributed to the situation giving rise to her grievance that would justify me reducing the remedies awarded to her.

⁹ Section 64 Employment Relations Act 2000.

Should either party contribute to the other party's costs?

[58] Costs are reserved. The parties are encouraged to resolve any issue of costs. If they are not able to do so and an Authority determination on costs is needed Ms Wells may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service Cashmere Club Inc would then have 14 days to lodge any reply. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[59] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless circumstances or factors required an upward or downward adjustment of that tariff.¹⁰

Summary of Orders

[60] Cashmere Club Inc is ordered to pay Sylvia Wells within 28 days:

- a. \$1,520.00 gross for lost earnings under s 123(1)(b) of the Act
- b. \$20,000.00 compensation under s 123(1)(c)(i) of the Act

Antoinette Baker
Member of the Employment Relations Authority

¹⁰ PBO Ltd v Da Cruz [2005] 1 ERNZ 808, 819-820 and Fagotti v Acme & Co Limited [2015] NZEmpC 135 at [106]-[108].