

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 341
3003060

BETWEEN ABIGAIL WOOD
Applicant

AND XIN YE ART LIMITED
Respondent

Member of Authority: Jenni-Maree Trotman
Representatives: Applicant in person
Tingting Du for the Respondent
Investigation Meeting: 25 and 27 October 2017
Date of Determination: 01 November 2017

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

- A. The Respondent unjustifiably dismissed the Applicant.**
- B. The Respondent is ordered to pay to the Applicant the following amounts within 14 days of the date of this determination:**
- a. The sum of \$950.40 gross for monies lost as a result of her personal grievance;**
 - b. The sum of \$3,000.00 under s 123(1)(c)(i) of the Employment Relations Act 2000;**
 - c. The sum of \$160.00 under s 131 of the Employment Relations Act 2000;**
 - d. The sum of \$71.56 for costs**

Employment Relationship Problem

[1] Ms Wood was employed by Xin Ye Art Limited, trading as “Pick Me Florist” (the Company) as a florist. On 9 December 2016, Ms Wood was told that the Company was closing its florist shop and her position would be made redundant. Her last day of employment was 23 December 2016. She claims she suffered an unjustified disadvantage and was unjustifiably dismissed.

[2] The Company denies that it acted in an unjustifiable manner giving rise to an unjustified disadvantage. It accepts Ms Wood’s position was made redundant. However, it says this decision was justified as it was due to the company ceasing to trade.

[3] As permitted by s 174E of the Act, this determination has not recorded all the evidence and submissions received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues:

[4] The issues to be determined are:

- (a) Was Ms Wood unjustifiably dismissed from her employment with the Company?
- (b) Did Ms Wood suffer an unjustified disadvantage to one or more of her conditions of employment?
- (c) If Ms Wood was unjustifiably dismissed, or suffered an unjustified disadvantage, what remedies should be awarded?
- (d) If any remedies are awarded, should they be reduced, under s124 of the Act, for blameworthy conduct by Ms Wood that contributed to the situation giving rise to his grievance?
- (e) Are any wage arrears owing to Ms Wood?

Issue One: Was Ms Wood unjustifiably dismissed?

Applicable Law

[5] In order for Ms Wood's redundancy to be justified, the Company must satisfy the requirements set out in s 103A of the Act. This requires an objective assessment of whether the Company's actions, and how it acted, were what a fair and reasonable employer could do in all the circumstances at the time the dismissal occurred.

[6] Part of this assessment involves a consideration of Section 4(1)(A)(c) of the Act.¹ Under s 4(1A)(c) the law requires an employer, who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee, to provide to that employee access to information, relevant to the continuation of the employee's employment, about the decision. In addition, it is required to provide the employee with an opportunity to comment on the information to the employer before the decision is made.

[7] The key requirements of consultation were recently summarised by Judge Inglis (as she then was) in *Stormont v Peddle Thorp Aitken Limited*².

Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done. Consultation must be a reality, not a charade. Employees must know what is proposed before they can be expected to give their view on it. This requires the provision of sufficiently precise information, in a timely manner. The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.

[8] The genuineness of the redundancy is an important aspect of the Authority's investigation. Once that is established, if an employer concludes that an employee is surplus to its needs, the Authority is not to substitute its business judgment for that of the employer.³

Relevant Facts

[9] The Company expanded in January 2016 by opening a second flower shop in Silverdale, Auckland. The new store was not successful resulting in its closure. This affected the Company's profit. In addition, during 2016, the Company lost its

¹ *Simpson Farms v Aberhart* [2006] ERNZ 825 (Emp)

² [2017] NZEmpC 71 at [54]

³ *Grace Team Accounting Ltd v Brake* [2014] NZCA 541 at [89]

business manager and one of its senior florists. The loss of staff, combined with the loss of sales from its Silverdale shop and additional expenditure, left the Company in financial difficulty.

[10] Ms Du, the Company's sole director, says she tried to assist with the Company's cash flow by working in the business herself and contributing her own personal monies. However, by October 2016, Ms Du says a serious medical condition resulted in her being unable to work for any great length of time. Due to the financial difficulties being experienced by the Company, and her health issues, she decided to sell the business.

[11] Ms Du says she met with staff in October 2016 to advise them of her decision. Ms Woods confirms Ms Gu told her she was considering selling the business. She says she was asked if she would like to continue with the new owners if the business was sold. Ms Wood said she would.

[12] In or about November 2016 Ms Du confirmed to Ms Wood that the business was to be sold. Ms Wood says Ms Du checked with Ms Wood to confirm she was still willing to continue working for the new owner. Ms Wood assured her again that she would. Around this time Ms Wood says she also became aware that the business was being advertised on Trade Me for sale.

[13] By the beginning of December 2016, the business had not sold. This was despite the price of the business being dropped to approximately half that of its original sale price. The Company was in arrears in payment of its rent and Ms Du's medical condition had also deteriorated further. As Ms Du was unable to obtain the urgent surgery she required in New Zealand, a decision was made to have the surgery in China.

[14] Ms Du said these factors left her with no option but to close the shop immediately. She emailed Ms Wood on 9 December 2016 advising:

I was very sick last night so didn't check my phone. But at very early this morning, after I read your email and text, I think it's time to make my final decision what I should do with my business. As you know, I have been not health for several month. I'm put Pick Me on the market for sale, the reason I am doing this is because you and Sue are really working hard for me, and you told me you love working for Pick Me after another flower shop offer you a job. So I was try to saving the Pick Me for you guys to woking (sic) with, but now, My health going worth (sic) I am really not able to run the business anymore.

I made a hard decision last night that to shut down the shop before Xmas. I feel so sorry to your guys, you just did such nice X'mas window!

I start closing down process today. Because you have kids need to be look after. You do not need to come for work anymore. As I said to you yesterday in my email, right now we still have last month rent fee waiting to pay, so there's not much I can do for you. I will pay you until Xmas as annual leave. If there is any annual leave or hours owing you after closing down, I will pay you a lump sum to clean. I really appreciate if you could understand that our company is in a very hard situation.

[15] Ms Du explained that her medical status at the time of sending this email was such that she was unable to get out of bed and could not speak. She said notifying Ms Wood by email was the only option that she had.

[16] Following receipt of this email there was an exchange of email correspondence between the parties regarding Ms Wood's notice period. Particularly whether this was to be paid or whether Ms Wood's annual leave would be used. Ms Du confirmed she would pay Ms Wood two weeks' salary as well as her annual leave and payment for any unpaid hours she had worked. Following further dialogue Ms Du confirmed to Ms Wood:

I am going back to China on 23rd of Dec. The reason I am going back is because there's one month waiting list for me to see the specialist and my health condition is unable to wait for that long, just let you know that I also unable to change my flight date because my operation date is been scheduled in China. Hopefully after operation I could keep my life running. But I don't konw (sic) when I could come back to New Zealand.

[17] This email was followed by another email on 28 December 2016. This was sent by Ms Du's husband on behalf of the Company and enclosed details of Ms Wood's final pay and how this was calculated. It advised:

I am acting for Sissy to send you this email, because she is unwell and doing treatment overseas.

Upon to Sissy's Emails in early December 2016, she has been unwell and deiced (sic) to close down the PickMe business on this Xmas permanently. By now the business has been closed down.

It is sad to close such a business that many people contributed their hard work in it. Sissy do appreciate your hard work during the employment.

Sissy tried her best making the close down notice period pay and final pay to you (paid by online banking today to your regular bank account for salary).

A copy of your employment contract is attached. Unfortunately no redundancy compensation according to the agreement.

Below is the summary of pay slip during close down period.

.....

Sissy and myself wishes you and your family all the best.

Was the decision to terminate genuine?

[18] I am satisfied, on balance, that there were genuine reasons for the Company making Ms Wood's position redundant. Whilst this decision followed concerns being raised by Ms Wood about various aspects of her role, I accept the primary motivation for the termination of her employment was due to the financial position of the Company and Ms Wood's medical condition.

[19] The Company's financial records support the position advanced by the Respondent. It's IR4 Company Tax Returns for the years ended 31 March 2016 and 31 March 2017 show the downturn in the Company's solvency. Between the year ended 31 March 2016 and the year ended 31 March 2017 the Company's gross sales dropped by \$135,561.00 whereas its expenses remained similar. In the year ended 31 March 2016 the Company made a profit of \$18,050.00 whereas in the year ended 31 March 2017 the company suffered a loss of \$80,509.00. There is no dispute that the business closed on 23 December 2016.

Was a fair procedure followed?

[20] Although there were genuine reasons for the termination of Ms Wood's employment, the procedure that was followed by the Company was flawed, even having regard to the small size of the company. The Company failed to follow the requirements prescribed by the Act.

[21] There was no consultation with Ms Wood prior to the decision being made to terminate her employment. Whilst Ms Wood knew the Company was to be sold, she understood that her employment would continue with the new entity. Her expectation was reinforced by her discussions with Ms Du, by the Company taking on a part-timer in late November 2016, and discussions about Ms Wood becoming the manager of the store.

[22] There was no opportunity for Ms Wood to provide any input into the decision made by the Company. It is likely that Ms Wood may not have been able to say anything to prevent the Company from shutting down due to its precarious financial position and Ms Du's health. However, this was not certain.

[23] The Company's failure to comply with the statutory requirements was not minor and did result in Ms Wood being treated unfairly.⁴ The procedural failings undermined the justification for the dismissal. A decision to dismiss in all the circumstances known at the time was not therefore one that a fair and reasonable employer could have made.

[24] I find therefore that Ms Wood was unjustifiably dismissed from her employment with the Company and is entitled to remedies.

[25] For completeness I confirm that I considered but I do not accept the Company breached Clauses 11.1 and 11.2 of the IEA. The assignment of the lease to the third party was negotiated after notice of Ms Wood's termination had been provided. The assignment was dated 17 January 2017 and the new owner's application for tenancy with the building's management company is dated that same date. This was after Ms Wood had been terminated and the business had closed.

Issue 2: Unjustified Disadvantage

[26] Ms Wood claims the Company acted in an unjustifiable manner that caused disadvantage to the terms and conditions of her employment. The Statement of Problem pleads that the Company did this by failing to consult with her over the redundancy and by failing to inform her that the business was being sold.

[27] I have already addressed the failure by the Company to follow a fair process in implementing the redundancy including its failure to consult with Ms Wood over the proposed redundancy. I am satisfied that its failure caused Ms Wood's employment to be unjustifiably disadvantaged.

[28] As the factual matrix relied upon by Ms Wood to support her claim for unjustified disadvantage is the same as that relied upon to support her claim for unjustified dismissal there is no entitlement to two separate streams of relief. I therefore decline to award any remedies for this aspect of Ms Wood's claim.

⁴ Section 103A(5) of the Employment Relations Act 2000

Issue 3: Remedies

Lost remuneration

[29] Turning first to lost remuneration, in a situation where there is a flawed consultation process, but the substantive outcome is justified; the lost remuneration that an employee is entitled to should be limited to the amount of time it would take to get the process right.⁵

[30] In this case I estimate two weeks would have been sufficient to complete the consultation process correctly. Therefore Ms Wood is entitled to two weeks' lost remuneration pursuant to s 123(1)(b) of the Act.

[31] Ms Wood was paid a sum of \$22.00 gross per hour. She worked 20 hours per week. Two weeks' wages therefore totals \$880.00 gross.

[32] The Company is ordered to pay to Ms Wood the sum of \$880.00 gross together with the sum of \$70.40 gross for holiday pay. Payment of these sums must be made within 14 days of the date of this determination.

Compensation s123(1)(c)(i)

[33] Even if the procedural requirements had been followed by the Company, the result would have been the same. In terms of compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i) of the Act I therefore limit any award to the humiliation, loss of dignity and injury to feelings which arose as a result of the procedural failures.

[34] Ms Wood says the Company's procedural failures significantly impacted her. She explained how the manner in which she was notified of her dismissal was a "massive blow". It was unexpected and knocked her confidence. Due to the lack of consultation she felt she was being dismissed for other reasons. This left her feeling humiliated.

[35] Ms Wood claims a sum of \$5,000.00 under s 123(1)(c)(i) of the Act. However, based on the evidence I heard, I award Ms Wood a sum of \$3,000.00 as compensation for hurt and humiliation.

⁵ *Waitakere City Council v Ioane* [2004] 2 ERNZ 294 (CA)

Issue 4: Contribution

[36] I am satisfied that Ms Wood did not act in a way that was causative of, or contributed to, her grievance. Her actions were in no way culpable or blameworthy. I therefore do not find that there is any contribution.

Issue 5: Are any wage arrears owing to Ms Wood?

Annual leave

[37] The IEA states Ms Wood was to commence employment with the Company on 14 September 2015. However, the parties agree that Ms Wood was employed prior to this date although the exact date is in dispute.

[38] Ms Wood recalls this was in July 2015 following her job interview whereas Ms Gu recalls it was in August 2015. As neither party is able to provide me with an exact start date I have reached a middle ground of 1 August 2015.

[39] Ms Wood says that she was in receipt of an unemployment benefit during the period 1 August 2015 to 13 September 2015. She says she was therefore paid cash by the Company “under the table”. This is a matter which she will need to address with the appropriate authorities.

[40] Between 1 August 2015 and 13 September 2015, Ms Wood worked every Monday, Wednesday, Friday and Saturday from 9 am to 2 pm. In total she worked 125 hours. Ms Wood was paid \$16.00 cash per hour. Multiplying 125 hours by the hourly rate of \$16.00 I find Ms Wood was paid a sum of \$2,000.00. Ms Wood was not paid annual leave during this period. 8% of this sum is \$160.00.

[41] The Company is ordered to pay Ms Wood the sum of \$160.00 for unpaid annual holiday pay. Payment of this sum must be made within 14 days of the date of this determination.

Non-Payment for hours worked

[42] During the investigation meeting the Company produced a detailed schedule showing all hours and days Ms Woods worked, including overtime. Having reviewed this schedule Ms Wood raised concerns that she had not received payment for additional hours worked during February 2016 while another staff member was away.

[43] Having reviewed the schedule, and after considering the parties' respective evidence on this point, I am satisfied that Ms Wood was paid for any additional hours she worked. The schedule shows that during February 2016 Ms Wood's days of work increased from 4 days to 5 days per week. Her hours of work increased from 20 hours to 40 hours per week. In addition, the schedule had been provided to Ms Wood by email on 2 September 2016. Ms Wood raised no issue with the time record at that time.

Issue 5: Costs

[44] Ms Wood has not incurred legal fees in pursuing her claim. However, she is entitled to be reimbursed the fee of \$71.56 which she paid to lodge her application in the Authority.

Jenni-Maree Trotman
Member of the Employment Relations Authority