

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 333
5636194

BETWEEN

JANE OLDRIDGE
Applicant

AND

MUKUND AND PRIYANKA
ENTERPRISES LIMITED T/A
NATIONAL FLOWER
TRADERS
Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
Mukund Bhikha, director for the Respondent

Investigation Meeting: 3 October 2016

Oral determination: 3 October 2016

Written record issued: 3 October 2016

Determination: 3 October 2016

ORAL DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Jane Oldridge began work on 2 May 2016 as a sales and marketing assistant for a Mount Wellington business trading under the name of National Flower Traders (NFT). Under an arrangement made before she began working for NFT Ms Oldridge took three-and-a-half weeks' unpaid leave from 25 May in order to travel to Britain for family reasons. On her return from that leave she received a text message from NFT's owner Mukund Bhikha asking to meet with her the following day, Sunday 19 June. Although this was not a normal working day Ms Oldridge agreed. At the meeting Mr Bhikha told Ms Oldridge that the business could no longer afford to employ her due to loss of a major account and she was to be "let go", that is dismissed. Ms Oldridge asked Mr Bhikha to consider allowing her to work on reduced hours or to work out the four week notice period stated in her written employment agreement. Mr Bhikha declined both options and told her she would be

paid three weeks' pay, paid weekly over the next three weeks. When Ms Oldridge returned her company car to the business premises in the following week Mr Bhikha told her she would be paid two weeks' notice.

[2] By 30 June NFT had not paid Ms Oldridge any notice. Ms Oldridge also found out that another person, who she thought was also employed by NFT and was taken on after she had started work, continued to work for the business. Ms Oldridge lodged an application to the Authority seeking "compensation". Her claim was later clarified to comprise a claim for lost wages, compensation for distress caused by her dismissal and how it was carried out, payment of the remainder of a four week notice period (as NFT had since paid her an amount for some of that period) and her holiday pay.

[3] NFT did not lodge a statement in reply but, after receiving an Authority Minute sent to the parties about the issues, Mr Bhikha did attend a case management conference held by telephone to arrange an investigation meeting. He also provided copies of pay records for payments made to Ms Oldridge by NFT between 13 May and 8 July.

The Authority's investigation

[4] Ms Oldridge and Mr Bhikha both attended the Authority investigation meeting and gave evidence, under affirmation, in response to questions.

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

The issues

[6] The issues requiring investigation and determination were:

- (i) Where did liability lay for any amounts ordered to be paid to Ms Oldridge – Mukund & Priyanka Enterprises Limited or Mr Bhikha personally as the employment agreement did not indicate the employer was a limited liability company?

- (ii) Was Ms Oldridge properly consulted about the prospect that her position was to be made redundant, and given a real opportunity to comment on any such proposals, before any decision to terminate her employment was made?¹
- (iii) If Ms Oldridge was not given information and an opportunity to comment, was her dismissal and how it was carried out what a fair and reasonable employer could have done in all the circumstances at the time?²
- (iv) If not, what remedies were due to Ms Oldridge, considering:
 - (a) Lost wages from the period from her dismissal to the Authority investigation meeting (provided Ms Oldridge also established she had searched for work in that time and to be calculated after deducting any income earned in that period); and
 - (b) Compensation for humiliation, loss of dignity and injury to feelings arising from her dismissal and how it was carried out; and
 - (c) Whether any reduction of remedies should be made for any actions by Ms Oldridge contributing to the situation giving rise to her grievance?
- (v) Was any other money also owed to Ms Oldridge for a four week notice period provided in her employment agreement and for holiday pay on her earnings while employed by the Respondent?
- (vi) Should either party be required to contribute to any costs of representation incurred by the other party?
- (vii) Should Ms Oldridge be reimbursed the \$71.56 fee paid to lodge her application in the Authority?

The liable employer

[7] Ms Oldridge's written employment agreement defined the employer as "Mukund & Priyanka Enterprises T/A as National Flower Traders". It required her to report to "Mukund Bhikha – Managing Director". It ended with a declaration: "I Mukund Bhikha offer this employment to Jane Oldridge".

[8] There is a registered company (company number 1139814) called Mukund & Priyanka Enterprises Limited in which Mukund Bhikha and Priyankabhen Mukund Bhikha are recorded as directors and equal shareholders. However the Companies

¹ Employment Relations Act 2000, s 4(1A)(c).

² Employment Relations Act 2000, s 103A.

Act 1993 requires a company with limited liability to use the word “Limited” at the end of its name and to clearly state its name in all documents evidencing or creating legal obligations.³ Where the name of a company is incorrectly stated in such a document and the company fails to discharge an obligation created in that document, the person who issued or signed the document is liable to the same extent as the company.⁴ An exception to that rule may be made if the person signing the document can prove the person in whose favour the obligation was incurred, in this case the employee, was aware at the time the agreement was signed that the obligations were incurred by the company.

[9] A letter Ms Oldridge wrote to Mr Bhikha on 30 June refers to starting “employment with the company” in May and refers to him having talked when they met on 19 June about the company’s difficult situation. In her oral evidence Ms Oldridge confirmed she had understood she was employed by the company, not Mr Bhikha personally.

[10] Mr Bhikha also confirmed the company was the intended employer and agreed it should be identified as the respondent in this proceeding.

[11] For that reason I have amended the party identified as the respondent in this determination to Mukund & Priyanka Enterprises Limited t/a National Flower Traders.⁵ The limited liability company is responsible for meeting any orders made, not Mr Bhikha in his personal capacity.

Consultation about the prospect of redundancy?

[12] Ms Oldridge’s evidence established that she was surprised to be called to work on Sunday 19 June and told her employment was at an end. She was not consulted in any real sense about that prospect or given, with adequate notice and time to think about it, relevant information about the situation NFT faced so she could comment on it and the proposal to dismiss her. The options she did propose on the spur of the moment, including part-time work, were rejected out of hand. The decision was already, made without any real opportunity for input from her.⁶

³ Companies Act 1993, s 21 and s 25. See also *Southland Building Society v Austin* [2012] NZHC 497 at [56].

⁴ Section 25(2).

⁵ Employment Relations Act 2000, s 221.

⁶ Employment Relations Act 2000, s 4(1A)(c).

A justified dismissal?

[13] While Ms Oldridge was clearly denied her right to prior consultation and to have any alternative suggestions she might make fairly considered *before* NFT dismissed her on the grounds of redundancy, there was also a suggestion that she was dismissed while another person remained in employment doing some work she could have done. Mr Bhikha denied the other person was an employee although she did continue to do some work for the company. While Mr Bhikha gave oral evidence of an unexpected change in the circumstances of the business requiring NFT to end Ms Oldridge's employment suddenly, there was no detailed evidence about the financial reasons for her dismissal or why alternatives to it could not have been properly explored with her before her dismissal.⁷

[14] Mr Bhikha said he got professional advice from the Employers and Manufacturers Association and an employment lawyer in preparing Ms Oldridge's employment agreement but had not sought any advice before ending her employment. He said he thought there was a "mandatory" 90 day trial period but it was not included in the written employment agreement he signed on the company's behalf. The agreement was signed after Ms Oldridge started work so a trial period would not have applied anyway, even if it had been written into the agreement he had professionally prepared.⁸

[15] The manner in which Ms Oldridge was called unexpectedly to work and told her employment was at an end was not what a fair and reasonable employer could have done in all the circumstances at the time. Having failed to meet the test of justification set by s 103A of the Act, NFT's dismissal of Ms Oldridge on 19 June was unjustified. She was entitled to consideration of remedies.

Remedies

Lost wages

[16] Ms Oldridge was unemployed from 20 June until she began a new job, in a part-time role as a florist, from 5 September, with lower earnings than her job with NFT. By the time of the investigation meeting she had secured a further job which was full-time. The period of loss of her full time wage was therefore 11 weeks, with

⁷ *Grace Team Accounting Limited v Brake* [2014] ERNZ 129 (CA) at [85].

⁸ Employment Relations Act 2000, s 67A and s 67B.

an ongoing loss only partly offset by her earnings from the part-time job she held in September.

[17] She provided evidence of having applied for jobs, suitable to her skills and experience, during June, July and August which established she had made reasonable endeavours to offset her loss.

[18] In assessing a period for the award of lost wages two other factors needed to be considered. Firstly, Ms Oldridge was on another pre-arranged holiday from 22 to 29 August, and for which it would have been too early for her to have any leave entitlement if she had still been working for NFT, so those weeks are excluded from the period of lost wages. Secondly, as a contingency of life, there was a prospect NFT could have legitimately ended Ms Oldridge's employment for genuine business reasons in a relatively short period anyway.⁹ For those reasons, the period of lost wages was less than three months and could not be reasonably assessed as more than four weeks in addition to the notice period due and addressed later in this determination. An order for four weeks' lost wages was appropriate in those circumstances.

Compensation for humiliation, loss of dignity and injury to feelings

[19] Ms Oldridge was shocked by the suddenness and manner of her dismissal. It was carried out in a way that was inherently humiliating, damaging to her dignity and hurtful. It left her distressed at not being able to meet financial commitments for herself and her family. A modest but reasonable award in those circumstances, including taking account of the short period of her employment, was \$4000.

Contribution

[20] Under s 124 of the Act the Authority must consider whether any remedies awarded should be reduced due to conduct by Ms Oldridge that contributed to the situation giving rise to her grievance. However inadequately done NFT ended her employment on the grounds of redundancy not any failure by her to carry out her duties properly. By definition it was a 'no fault' dismissal and Ms Oldridge was not responsible for NFT's failure to do so in a lawful way. No reduction of remedies was required.

⁹ *Telecom New Zealand Limited v Nutter* [2004] 1 ERNZ 315 at [81].

Wages arrears

Outstanding notice

[21] Ms Oldridge's employment agreement provided for a four week notice period:

In the event the Employee's employment is to be terminated by reason of redundancy, the Employee shall be provided with 4 weeks' notice in writing. This notice is in substitution for and not in addition to the notice set out in the general termination clause.

[22] There was no written provision for payment in lieu of notice. NFT had paid two further weeks of salary after some delay, but Ms Oldridge was still entitled to a further two weeks' pay for the complete notice period she should have got.

Holiday pay

[23] Wage records provided by NFT and bank statements provided by Ms Oldridge established that she was paid a total of \$5384.50 in relation to her employment by NFT, including two weeks' notice and one public holiday. She was paid \$430.76 as holiday pay. Calculation of holiday pay needed to include the amounts that she should also have been paid at that time for her notice period of four weeks (whether paid in lieu or worked) and the amounts awarded as lost wages. The relevant total was \$10,961.56. Holiday pay due to her, calculated at eight per cent on that gross amount, was \$876.92. From that amount due two amounts had to be deducted - \$430.76 paid as holiday pay on 8 July and \$192.32, also paid on 8 July, for what appears to have been the Queen's Birthday public holiday. Ms Oldridge was on unpaid leave on Queen's Birthday and it would not otherwise have been a working day for her.¹⁰ The remainder, still due to her as holiday pay, was \$253.84

Costs

[24] Ms Oldridge had not incurred legal fees in pursuing her claim against NFT but was entitled to be reimbursed the fee she paid to lodge her application in the Authority.

Summary and orders

[25] For the reasons given, this determination has made the following findings and orders:

¹⁰ Holidays Act 2003, s 49 and s 12(3)(d).

- (i) NFT's decision to dismiss Ms Oldridge on the grounds of redundancy was made and carried out in a way that a fair and reasonable employer could not have done in all the circumstances at the time. Her dismissal was therefore unjustified.
- (ii) In settlement of Ms Oldridge's personal grievance for unjustified dismissal, NFT must pay her the following sums under s 123 of the Act:
 - (a) \$3846.16 in reimbursement of wages lost; and
 - (b) \$4000.00 (without deduction) as compensation for humiliation, loss of dignity and injury to her feelings.
- (iii) Under s 131 of the Act NFT must also pay Ms Oldridge the following sums as arrears of wages and holiday pay due to her at the end of her employment:
 - (a) \$1923.08 for two weeks' notice that remained unpaid at the date of this determination; and
 - (b) \$253.84 as holiday pay due to her at the end of her employment.
- (iv) NFT must reimburse Ms Oldridge \$71.56 for the fee paid to lodge her application.
- (v) All sums due to Ms Oldridge under these orders must be paid in full within 28 days of the date of this determination.

Robin Arthur
Member of the Employment Relations Authority