Note: This determination includes an order prohibiting publication of certain evidence.

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2016] NZERA Auckland 339
5619685

	BETWEEN	JANETTE CHESNUTT Applicant
	AND	GISBORNE RETURNED AND SERVICES' ASSOCIATION INCORPORATED Respondent

Member of Authority:	Andrew Dallas
Representatives:	Michelle England, Advocate for the Applicant Ben Tahata, Advocate for the Respondent
Investigation Meeting:	16 August 2016 at Gisborne
Submissions	During the investigation meeting
Determination:	5 October 2016

DETERMINATION OF THE AUTHORITY

A. Janette Chesnutt's hours of work were unlawfully varied by the Gisborne Returned and Services' Association Incorporation (RSA).

B. Ms Chesnutt was subject to an unjustified warning and an unjustified final warning.

C. Ms Chesnutt was subject to an unlawful restructuring process.

D. The RSA must settle Ms Chesnutt's personal grievances by:

(a) reinstating her hours of work to 40 hours per week with immediate effect;

(b) removing the warning and final warning from her

employment file with immediate effect;

(c) paying her the following amounts within 28 days of the date of this determination:

(i) $3026.00 gross as wages reimbursement; and;

(ii) $6000.00 in total as compensation, without deduction, for humiliation, loss of dignity and injury to feelings; and

(d) by making the following adjustments to her entitlements within seven days of the date of this determination:

(i) reinstating her sick leave balance to 11.5 days; and

(ii) reinstating two alternative leaves days; and

E. The RSA must pay Ms Chesnutt $71.56 as reimbursement of the Authority's filing fee within 28 days.

Prohibition from publication

[1] Under clause 10(1) of the Second Schedule to the Employment Relations Act 2000 (the Act), I have prohibited from publication the evidence lodged in these proceedings about the financial performance Gisborne Returned and Services Association Incorporated (RSA) except for the information contained in this determination.

Employment relationship problem

[2] There are a number of issues arising out of this on-going employment relationship, many of which are interrelated, between the parties.

[3] During a lengthy case management conference held with the parties on 12 July 2016 a further issue emerged regarding the lawfulness of a proposed restructure by the RSA of Ms Chesnutt's position. The RSA proposed to advertise Ms Chesnutt's position and require her to reapply for it. In response to discussion Mr Tahata gave an undertaking to the Authority not to proceed with the proposed restructure of Ms Chesnutt's position until the Authority had determined its legality.

[4] During the investigation meeting, Mr Tahata reconfirmed this undertaking. He further advised of the RSA's ongoing adherence to the undertaking on 28 September 2016.

[5] During the investigation meeting, I heard evidence from Ms Chesnutt and Mr Tahata. In addition an affidavit of Susan Leach, former manager of the RSA, was provided in support primarily of Ms Chesnutt's claim about her hours of work. Ms Leach was unable to attend the investigation meeting; therefore her affidavit was set aside.

[6] As permitted by s 174E of the Act this determination has not recorded all the evidence received from Ms Chesnutt and the RSA 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

[7] The following are the issues for investigation and determination:

(i) Was Ms Chesnutt disadvantaged in her employment by the RSA through:
   (a) the unilateral variation to her hours of work?;
   (b) the giving of a warning and a final warning?; and,
   (c) the proposed restructure to her position?

(ii) If the RSA's actions were not justified what remedies should be awarded, considering:
   (a) compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act; and,
   (b) compensation for lost wages under s 123(1)(b) of the Act?

(iii) If any remedies are awarded, should they be reduced under s 124 of the Act for blameworthy conduct by Ms Chesnutt that contributed to the situation giving rise to her grievances?

[8] Ms Chesnutt alleged in her second statement of problem that she was subject to "unfair bargaining" by the RSA over the variation to her hours of work. However I find that Ms Chesnutt already raised a personal grievance with the RSA about the variation of her hours of work in her letter of 29 March 2016 or, at the latest, in her first statement of problem lodged with the Authority on 6 April 2016. Therefore, as the conduct complained of is being addressed by the personal grievance, it is not necessary to address the issue of unfair bargaining, even if s 68 of the Act were applicable to the circumstances

Factual background

[9] Ms Chesnutt is employed as Bar Manager at the Gisborne RSA. Her employment is governed by an individual employment agreement that commenced on 8 October 2012.

[10] Ms Chesnutt's employment agreement outlines that her hours of work are to be:

> 6. Hours of work
>
> 6.1 The Employee's hours of work shall be 40 hours per week to be worked over 5 to 6 days where practicable.
> 6.2 These hours and the days worked will be flexible to meet the operating hours of the [RSA], nature of the requirements and the work commitments.

[11] In late 2015, the RSA's manager resigned and the President of the RSA, Ben Tahata, assumed the role of acting manager.

[12] On 7 September 2015, Ms Chesnutt received a letter from Mr Tahata with the subject line "Proposed Management of Change - Restructuring".

[13] The letter advised of several operational changes affecting two staff members at the RSA, including Ms Chesnutt. The letter re-confirmed that Ms Chesnutt's hours of work were 40 hours a week. The letter concluded by stating:

> The roster proposal will be subject to constant review between you both and the President.
>
> As these changes are considered 'temporary' this letter signed by both parties was (sic) suffice rather than provide a further Individual Employment Agreement (IEA). It will be an addendum to your current IEA.

[14] Ms Chesnutt agreed to the RSA's proposed changes. She continued to work 40 hours a week.

[15] On 5 March 2016, Ms Chesnutt says she had a disagreement with Mr Tahata about a bar license that was required for an event to be held that evening at the RSA.

[16] On 7 March 2016, Ms Chesnutt says she received a text message from Mr Tahata, which was followed by a telephone conversation, where he accused her of opening the bar outside of hours and taking money. Ms Chesnutt denied both allegations and said she had evidence to demonstrate an absence of wrongdoing.

[17] The disagreement between the pair escalated. The RSA's committee became involved after receiving complaints from Ms Chesnutt about Mr Tahata.

[18] On 10 March 2016, Mr Tahata called Ms Chesnutt into his office and advised that he was reducing her rostered hours from 40 to 30 per week. Ms Chesnutt said she would like time to consider and discuss the proposal further. He declined her proposal for further time by then handing her a letter confirming the reduction in hours. Ms Chesnutt formally disputed the variation of hours in a letter dated 18 March 2016.

[19] Also on 10 March 2016, Mr Tahata gave Ms Chesnutt a further letter advising her that the RSA's committee would not meet with her to discuss her complaints about Mr Tahata. The letter also made several allegations about Ms Chesnutt's conduct as bar manager. These included alleged banking errors, being "hung-over" on a shift immediately after an event at the RSA, a dispute about the removal from the wall of the RSA liquor licence(which may or may not have expired), and a further

issue about an application to Gisborne District Council for a special licence. The letter did not seek a response from Ms Chesnutt to the allegations contained within it.

[20] On 11 March 2016, Mr Tahata handed Ms Chesnutt another letter, which she did not open at that time. When she subsequently read the letter on 12 March 2016, it contained a written warning regarding the removal of the RSA's liquor licence from the wall. The letter also required Ms Chesnutt to advise Mr Tahata by 10.00am on 12 March 2016 that she had deleted a recording of the conversation he had with her on 10 March 2016, which he claimed was illegally recorded, otherwise she was advised she would receive "another formal warning". The deadline for a response to the letter had already expired by the time Ms Chesnutt read the letter.

[21] On 13 March 2016, Ms Chesnutt received a text message from Mr Tahata which advised there was a letter in her mailbox. The letter, which was dated 12 March 2016, was a final written warning for failing to respond to Mr Tahata's letter of 11 March 2016.

[22] On 14 March 2016, a day Ms Chesnutt was not rostered to work, she received a text message from Mr Tahata advising there was another letter in her letterbox. The letter, which was dated 13 March 2016, reiterated the final written warning of 12 March 2016 and made a further allegation of "serious misconduct" for removing a former employee's bar manager's certificate from the wall of the RSA.

[23] On 16 March 2016, Ms Chesnutt went to see her general practitioner complaining of workplace stress. She was provided with a medical certificate which said she was unfit to return to work until 29 March 2016. Ms Chesnutt provided this certificate to Mr Tahata.

[24] On 17 March 2016, Ms Chesnutt received a phone message from Mr Tahata accusing her of taking various items from the RSA including the safe keys.

[25] On 18 March 2016, Ms Chesnutt wrote a letter to Mr Tahata and also provided a copy of her letter to the RSA Committee. Ms Chesnutt sought to answer the issues and allegations that had been raised by Mr Tahata in his various pieces of correspondence and disputed her reduction in rostered hours. She also requested a meeting with the RSA Committee.

[26] On 19 March 2016, Ms Chesnutt said she received a phone message from Mr Tahata alleging she had removed another set of keys from the RSA and that he would call the police if she did not respond by midday that day. Ms Chesnutt responded by text advising Mr Tahata where the keys could be located and asked him to stop harassing her as she was on sick leave. Ms Chesnutt also phoned the Vice President of the RSA and asked him to ask Mr Tahata to stop harassing her.

[27] On 19 March 2016, Ms Chesnutt received a text message from Mr Tahata advising her that the RSA Committee had considered her letter of 18 March 2016 and had decided not to meet with her.

[28] Mr Tahata followed this text message up with a letter dated 21 March 2016 but received by Ms Chesnutt on 24 March 2016. In the body of the letter, Mr Tahata stated: "[t]he RSA Executive Committee were also made aware of your 'warnings' and 'final warning' and were surprised you were still employed". Mr Tahata also questioned Ms Chesnutt's living arrangements in her Housing New Zealand house.

[29] On 22 March 2016, Ms Chesnutt sent a text to Mr Tahata asking why she had not been paid her sick leave.

[30] On 23 March 2016, Mr Tahata replied that the RSA considered her medical certificate was invalid and she would not be paid sick leave. Ms Chesnutt wrote to Mr Tahata requesting immediate payment of her sick leave.

[31] On 26 March 2016, Ms Chesnutt received another hand delivered letter from Mr Tahata. It advised her that her medical certificate was "deemed invalid" by the RSA and that she could not return to work on the 29 March 2016 unless she made prior arrangements with Mr Tahata to do so and she satisfied various conditions. These included demonstrating a "respect for Governance and Management" and there being "no repetition of matters already subject to 'warnings' and a 'final warning'".

[32] On 27 March 2016, Ms Chesnutt wrote to Mr Tahata and copied in the RSA Vice President. She sought to respond to various matters raised by Mr Tahata in his correspondence.

[33] On 28 March 2016, Mr Tahata sent Ms Chesnutt a letter stating that there was no change to the position he set out in his letter of 26 March 2016.

[34] On 29 March 2016, Ms Chesnutt attempted to return to work. The locks had been changed and she could not enter the building. Ms Chesnutt attempted to contact Mr Tahata without success.

[35] On 29 March 2016, Ms Chesnutt hand delivered a letter to Mr Tahata and the RSA Vice President advising them of her intention to raise a personal grievance. In the letter she offered an opportunity to have a meeting or attend mediation.

[36] Later that same day, Ms Chesnutt received a text from Mr Tahata advising her that there was no change to the RSA's position as set out in the letter of 26 March 2016.

[37] On 4 April 2016, Ms Chesnutt texted Mr Tahata to ask for a key to the RSA so she could return to work on the following Tuesday. Mr Tahata replied that, as she had not made an arrangement about returning to work in accordance with the letter of 26 March 2016, she could not return to the roster.

[38] On 5 April 2016, Ms Chesnutt lodged an urgent application in the Employment Relations Authority. On 7 April 2016, the Authority directed the parties to attend mediation on 19 April 2016. Mr Tahata arrived at the mediation but, as confirmed by the mediator, subsequently refused to attend the mediation.

[39] On 20 April 2016, during a case management conference with the Authority, Mr Tahata agreed to allow Ms Chesnutt to return to duty and pay her wages for the period she was denied access to the RSA. The parties also agreed to attend mediation.

[40] Ms Chesnutt returned to duty on 21 April 2016. However, Mr Tahata refused to roster her on for 40 hours a week on the basis that Ms Chesnutt had agreed to a variation of her hours of work to 30 hours per week on 10 March 2016.

[41] In the three week period immediately after Ms Chesnutt returned to work, the RSA deducted several alternative leave days from her leave accruals without explanation.

[42] On 30 May 2016, Ms Chesnutt received a letter from Mr Tahata advising her that the RSA Committee had decided to "advertise" her position of Bar Manager.

[43] The basis of the RSA's decision was said in the letter to be "succession planning" and to "achieve a profit situation that we have enjoyed prior".

[44] The letter invited Ms Chesnutt to apply for her own position. Her position was advertised by the RSA in the *Gisborne Herald* on four separate occasions.

Were Ms Chesnutt's hours of work lawfully varied by the RSA?

[45] Consistent with cl 6.1 of her employment agreement, Ms Chesnutt maintained her hours of work at the RSA were 40 hours per week. She agreed to enter into a variation to the roster with the RSA on 7 September 2015 but her hours of work were to remain 40 hours a week.

[46] The variation is recorded in the letter issued by Mr Tahata to Ms Chesnutt. The letter detailed the roster change and reconfirmed her hours as 40 hours per week. Ms Chesnutt countersigned the letter.

[47] I find this was a lawful variation of Ms Chesnutt's employment agreement.

[48] Using this first variation as a baseline, Mr Tahata claimed that Ms Chesnutt agreed to vary her hours of work to 30 hours a week on 10 March 2016. He initially claimed he had documentation to prove this second variation. However, when pressed on several occasions by the Authority to provide this documentation, he was unable to do so.

[49] Ms Chesnutt said in her oral evidence she consistently opposed the reduction in hours. She said her opposition to variation was also recorded in her letter to Mr Tahata dated 18 March 2016. A review of this document discloses that Ms Chesnutt

opposed the reduction in her hours. Mr Tahata responded to this letter so it is presumed he read it and was aware of Ms Chesnutt's opposition from that letter, if not otherwise.

[50] I prefer and accept Ms Chesnutt's evidence. I find there was no agreement, oral or written, between Ms Chesnutt and the RSA about a change to her hours of work after the first, agreed, variation on 7 September 2015. It may have been the RSA's intention to reduce her hours to 30 a week but it was not a common intention.

[51] The answer is "no", Ms Chesnutt's hours of work were not lawfully varied by the RSA. Her contractual hours of work are 40 hours a week. Ms Chesnutt's personal grievance against the RSA is made out (First Personal Grievance).

Was Ms Chesnutt's warning and final warning justified?

[52] The disciplinary "process" carried out by Mr Tahata was surrounded by frenetic activity and a large amount of correspondence. Some of the activity, particularly in relation to leaving letters in Ms Chesnutt's letterbox and texting her when she was not rostered to work or on sick leave, is troubling. While it appears there were multiple warnings given to Ms Chesnutt during this period by the RSA, I find there was actually only two: the written warning of 11 March 2016 and the final warning of 12 March 2016. The correspondence issued by Mr Tahata to Ms Chesnutt after this date only served to reinforce and reiterate these warnings.

[53] It was not clear from the evidence what, if any, investigation Mr Tahata carried out before issuing his letter of 11 March 2016. The letter of 10 March 2016, containing the allegation about the RSA's liquor licence, did not seek a response from Ms Chesnutt.

[54] In addition, Ms Chesnutt had less than 24 hours to advise she had deleted the recording of her conversation with Mr Tahata on 10 March 2016 or she would be given a final warning. Mr Tahata did not advise Ms Chesnutt of the short timeframe for responding when personally issuing her with the letter on 11 March 2016. Mr Tahata said in his evidence that he did not consider any response from Ms Chesnutt,

or press her to provide a response, before he issued her with the warning on 11 March 2016 and the final warning on 12 March 2016.

[55] In issuing the final warning, Mr Tahata appeared to be relying on the fact that the recording was "illegal". However, the Court of Appeal and the Employment Court have taken a contrary view.[1]

[56] I find these were was not the actions of a fair and reasonable employer.[2] I further find these defects of process by Mr Tahata were not minor and Ms Chesnutt was treated unfairly.[3]

[57] The answer is "no", Ms Chesnutt's warning and final warning were not justified. Ms Chesnutt's personal grievance against the RSA is made out (Second Personal Grievance).

Is the proposed restructuring of Ms Chesnutt's position lawful?

[58] Ms Chesnutt said the proposal to advertise her job was sprung on her by the RSA. Ms Chesnutt said she was very upset about it. This is not surprising. She drew a link between the proposed restructuring and her deteriorating relationship with Mr Tahata arising out of the on-going, and now found to be unjustified, disciplinary process.

[59] In justifying the restructuring proposal, Mr Tahata relied on the RSA's "prerogative" to restructure Ms Chesnutt's position and "the Employment Act". He also could not point to any provisions of Ms Chesnutt's employment agreement that would allow him to restructure her position in the way proposed by the RSA. In addition, Mr Tahata sought to rely on the RSA's financial position. The problem with reliance on the RSA's financial position, of course, was that Ms Chesnutt's position was advertised and was actually to be refilled.

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[1] *Talbot v Air New Zealand Limited* [1995] 3 ERNZ 356 (CA) and *D'Arcy-Smith v Natural Habitats Limited* [2015] NZEmpC 123.
[2] Employment Relations Act 2000, s103A(3)(a), (c) and (d).
[3] Employment Relations Act 2000, s 103A(5).

[60] Having reviewed all of the relevant material, including Ms Chesnutt's employment agreement, and having considered Mr Tahata's submissions and evidence, I find the restructuring process, insofar as it relates to Ms Chesnutt, is inconsistent with her employment agreement and contrary to RSA's good faith obligations in s 4(4)(d) of the Act. I further find that Ms Chesnutt has a personal grievance against the RSA as the restructuring is an unjustified action that has, and is, causing her disadvantage (Third Personal Grievance).

[61] The answer is "no", the proposed restructuring of Ms Chesnutt's position is not lawful.

Remedies

[62] Having found the RSA was not justified in its actions towards Ms Chesnutt, she is entitled to an assessment of remedies for her three personal grievances.

Reimbursement for lost wages

[63] Arising out of her First Personal Grievance, Ms Chesnutt sought reimbursement for the wages lost to her as a result of the variation of her hours of work on and from 10 March 2016. The amount of lost wages was calculated as $3026.00 gross.

[64] Subject to consideration of any contribution under s 124 of the Act, I find this amount to be fair and reasonable in the circumstances of the case.

Sick leave and alternative leave reinstatement

[65] Also arising out of this grievance, Ms Chesnutt sought reinstatement of her sick leave balance to 11.5 days. She said her use of sick leave arose directly out of her treatment by the RSA and the questioning of the validity of her medical certificate exacerbated her distress.

[66] Arising further out of this grievance, Ms Chesnutt also sought reinstatement of two alternative leave days that she said were deducted from her entitlements without explanation or justification.

[67] Subject to consideration of any contribution under s 124 of the Act, I find the reinstatement of both 11.5 sick days and 2 alternative leave days fair and reasonable in the circumstances of the case.

Compensation for humiliation, loss of dignity and injury to feelings

[68] Ms Chesnutt was subject to three unjustified actions by the RSA to her disadvantage. Ms Chesnutt sought $50,000 compensation for humiliation, loss of dignity and injury to feelings. Ms Chesnutt said she was very hurt and upset by the actions of the RSA and was completely humiliated when they advertised her job four times in the Gisborne Times.

[69] I accept Ms Chesnutt suffered humiliation, loss of dignity and injury to feelings because of the unjustified actions taken against her by the RSA.

[70] In respect of her First Personal Grievance, subject to consideration of any contribution by Ms Chesnutt under s 124 of the Act, I find $2500.00 is an appropriate amount to award as compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act. In doing so, I have taken the following aggravating factors into account: unlawfully preventing her from attending work (which was only resolved after the intervention of the Authority) and questioning the validity of her medical certificate without proper foundation.

[71] In respect of her Second Personal Grievance, subject to consideration of any contribution by Ms Chesnutt under s 124 of the Act, I find $2500.00 is an appropriate amount to award as compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act. In doing so, I have taken into account the following aggravating factors: placing correspondence including a warning and final warning in her letterbox and contacting her about disciplinary issues while she was on sick-leave or was not rostered to work.

[72] In respect of her Third Personal Grievance, subject to consideration of any contribution by Ms Chesnutt under s 124 of the Act, I find $1000.00 is an appropriate amount to award as compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act.

Contributory behaviour by Ms Chesnutt?

[73] Having found that Ms Chesnutt was entitled to remedies for her personal grievances, I was required by s 124 of the Act to consider whether she contributed to the situation giving rise to her grievance.

[74] For Ms Chesnutt, it was submitted that as she was involved in no wrongful action, remedies should not be reduced.

[75] Having found the RSA engaged in three unjustified actions to Ms Chesnutt's disadvantage including two with aggravating circumstances, I accept this submission. There is no deduction for contribution under s 124 of the Act.

Summary of orders

[76] In summary, the orders made for RSA to settle Ms Chesnutt's personal grievances are:

(a) reinstating her hours of work to 40 hours a week with immediate effect;
(b) removing the warning dated 11 March 2016 and the final warning dated 12 March 2015 from her employment file (and any correspondence referring or relating to the warnings);
(c) paying her the following amounts within 28 days of the date of this determination:
    (i) $3026.00 gross as wages reimbursement under s 123(1)(b) of the Act;

(ii) $6000.00 in total as compensation, without deduction, for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act; and

(d) within seven days of the date of this determination:

(i) reinstating her sick leave balance to 11.5 days; and

(ii) reinstating two alternative leaves days.

Costs

[77] As Ms Chesnutt was being represented on a "pro-bono" basis, there is no order for costs. However, it is also fair and reasonable in all the circumstances to require the RSA to reimburse Ms Chesnutt for the Authority's filing fee of $71.56 within 28 days of the date of this determination.

Further steps

[78] As this is an ongoing employment relationship problem, the parties are directed to attend mediation to discuss the implications of this determination. An Authority Officer will contact the parties shortly to ensure this occurs as quickly as possible.

Andrew Dallas
Member of the Employment Relations Authority