

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Auckland 199  
5635002

BETWEEN

KERRY MACDONALD  
Applicant

AND

TKR PROPERTIES LIMITED  
T/A TOP PUB & ROUTE 26  
BAR AND GRILL  
Respondent

Member of Authority: Robin Arthur

Representatives: Alex Kersjes, Advocate for the Applicant  
Russell Mead, Advocate for the Respondent

Investigation Meeting: 5 July 2017

Determination: 7 July 2017

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**DETERMINATION OF THE AUTHORITY**

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- A. TKR Properties Limited (TKRPL) acted unjustifiably in terminating its employment of Kerry MacDonald.**
- B. In settlement of her personal grievance for unjustified dismissal TKRPL must pay Ms MacDonald the following sums within 28 days of the date of this determination:**
- (i) \$2,200 in reimbursement of lost wages; and**
  - (ii) \$12,000 as compensation for humiliation, loss of dignity and injury to her feelings.**
- C. Costs are reserved with a timetable set for memoranda if an Authority determination of costs is required.**

**Employment Relationship Problem**

[1] Kerry MacDonald worked at the “Top Pub”, a bar in Morrinsville, from 2009 until 2 April 2015. For the last two years or so of her employment her employer was

TKR Properties Limited (TKRPL). A related company owned the premises and TKRPL held the licences for the sale of liquor, for a TAB operation and as a venue for gaming machines.

[2] For most of the last year of Ms MacDonald's employment she was the bar manager and worked 55 or more hours a week. Her role changed and her work hours were reduced in early March 2015. Those changes followed TKRPL's decision to employ Clinton Slack as operations manager for the business. Mr Slack's employment was part of a plan for him to buy into the business, which included an arrangement for him to become a shareholder in TKRPL.

[3] On 10 March 2015 Ms MacDonald was given this letter signed by TKRPL directors Russell Mead and Terry Boubee:

TRK Properties Ltd T/A Top Pub Morrinsville will cease sole ownership of the business on Tuesday March 31<sup>st</sup> 2015.

A new company including Clinton Slack will start operation on Wednesday 1<sup>st</sup> April 2015.

This means all existing employees of [TKRPL] and current employment contracts will be terminated on Tuesday March 31<sup>st</sup>.

All outstanding annual leave, alternate holidays and any other benefits owing at this time will be paid out within 7 days.

We invited (sic) you to apply for your current job with the new company in the next week or so. Interviews will be done from 20<sup>th</sup> March onwards.

All successful applicants must return new signed contract by Monday 30<sup>th</sup> March 2015.

[4] Ms MacDonald did not attend an interview but was offered on-going employment. She did not accept it. Although Mr Slack was keen to keep her on the bar's staff, the job she was offered was for fewer hours, at a lower hourly rate and of lower status than the manager's role she had carried out prior to his employment. Instead she looked for and found a job elsewhere, signing an employment agreement for that job on 30 March. She was to start work in her new job on 13 April. She told Mr Slack of her decision and her new job. At his request, Ms MacDonald provided a letter of resignation from her Top Pub job.

[5] On 22 April 2015 Ms MacDonald raised a personal grievance for unjustified dismissal. She did so on the two grounds. The first was she said TKRPL still owned and operated the business, not a new company, and she had simply been replaced by a new manager. The second ground was that, even if the business had changed hands, TKRPL had not followed a proper process for the redundancy of her position and the termination of her employment. Her grievance letter sought remedies of lost wages, distress compensation and unspecified penalties for breach of the Employment Relations Act 2000 (the Act).

[6] A statement of problem about her grievance was not lodged until 11 July 2016. This was outside the 12-month period in which penalties could be pursued but she was within time to seek the remedies of lost wages and distress compensation that she claimed.<sup>1</sup> In its statement of reply TKRPL denied Ms MacDonald was dismissed. It said she resigned before being interviewed about continued employment. It said Mr Slack was employed as a manager on the understanding he would take a shareholding in the company.

[7] On 9 March 2015 Mr Slack had signed an agreement with the heading “Share Purchase Agreement”. Mr Mead and Mr Boubee signed the agreement on 10 March 2015. It said he would “purchase a 20% shareholding in the lease of the premises known as the Top Pub” and he would “receive a 20% share” in TKRPL. The agreement stated that the company would “change the share structure to include Clinton Slack in the registered shareholding”.

[8] However that arrangement did not go ahead after Mr Slack advised Mr Mead in late March 2015 that a previous company he was involved with had gone into liquidation in February 2015. TKRPL’s directors were concerned Mr Slack might not meet some requirements set in the gambling legislation for companies, such as TKRPL, that held venue licences for gaming machines on the pub premises.<sup>2</sup> Mr Slack stayed on as the operations manager for a further year but their plan for “a management buy in” by him purchasing shares in TKRPL did not proceed.

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<sup>1</sup> Employment Relations Act 2000, s 135(5).

<sup>2</sup> See Gambling Act 2003, s 68 and s 4 definition of “key person” at paragraph (b).

## **The Authority's investigation**

[9] For the purposes of the Authority's investigation written witness statements were lodged by Ms MacDonald, Mr Mead, Mr Slack, another former employee Alicia Witte and, in support of Ms MacDonald's claims for distress compensation, from her friend, Briar Gray and a relative, Grant Snedden. Each of those six witnesses attended the investigation meeting and, under oath or affirmation, answered questions from me and the parties' representatives. The representatives also had an opportunity to provide oral closing submissions on the issues for resolution. I record that I did not hear from some other people proffered by the parties as witnesses, or take account of written statements lodged from them, as those statements touched on irrelevant matters or merely amplified or echoed what they had been told by witnesses who were directly involved in relevant conversations or events. Evidence from those direct witnesses, referred to above, was preferred. I also put aside and took no account of a document that was said to be a transcript of a brief telephone conversation between Mr Slack and Ms MacDonald's advocate, Mr Kersjes.

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

## **The issues**

[11] From the investigation the following issues required determination:

- (i) Did TKRPL act in good faith in its communications with Ms MacDonald about changes to its business and her employment?
- (ii) If TKRPL had breached its good faith duties, had Ms MacDonald's supposed resignation really been a constructive dismissal resulting from the breach or was the end of her employment otherwise an unjustified dismissal?
- (iii) If Ms MacDonald's employment did end by constructive or other unjustified dismissal, what remedies should be awarded, considering lost wages and compensation for humiliation, loss of dignity and injury to feelings?

- (iv) Should any remedies awarded be reduced due to conduct by Ms MacDonald contributing to the situation giving rise to her grievance?
- (v) Should either party contribute to the costs of representation of the other party?

### **A failure of good faith?**

[12] The Act requires parties to an employment relationship to act in good faith. This includes not doing anything, directly or indirectly, to mislead or deceive each other. Where an employer is considering making a decision that will, or is likely to, have an adverse effect on the continuation of a worker's employment, this duty of good faith places two specific requirements on that employer. Firstly, the employer must provide the worker with access to information about that decision and, secondly, give the worker an opportunity to comment on the information before the employer makes its final decision.<sup>3</sup>

[13] TKRPL's actions had to be assessed against the statutory test of justification. This test asks whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time?<sup>4</sup>

[14] There were three ways TKRPL failed to meet its good faith obligations and failed to the statutory test of acting as a fair and reasonable employer could have done.

#### *No proper consultation over redundancy of bar manager position*

[15] Firstly, Ms MacDonald was replaced as bar manager by the appointment of Mr Slack as operations manager, with a consequent reduction in her level of responsibility and her hours of work, without any real prior consultation about those changes. On 18 February 2015 Mr Mead had, according to a diary note he made, told Ms MacDonald he would "look at alternative arrangements" for the bar's management. He made the comment in the course of a conversation with her about whether she was "willing to manage the pub". According to his note, Ms MacDonald said she did not want to do so if it meant she had to keep doing the "cash up" of

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<sup>3</sup> Employment Relations Act 2000, s 4(1) and (1A).

<sup>4</sup> Section 103A.

takings at the end of each day. She wanted Mr Mead to do that work, because of the amount of time it took after the premises closed for the night and because she felt some questions Mr Mead had asked her about the cash records meant he was blaming her for some problems with them.

[16] However Ms MacDonald was not consulted about “alternative arrangements”, or what effect they might have on her position, before Mr Slack arrived at the workplace on 3 March to start work as Operations Manager. In fact, Mr Slack had signed his employment agreement for that job on 16 February, two days before the discussion during which Mr Mead said he mentioned the notion of ‘alternative arrangements’ for the bar’s management to Ms MacDonald. Ms MacDonald only found out about Mr Slack’s appointment when he arrived at work on 3 March.

[17] The effect of Mr Slack’s appointment was that the position of bar manager, held by Ms MacDonald, was redundant. The position, as she had carried it out, became surplus to TKRPL’s requirements because Mr Slack was to carry out the managerial duties she had previously done. From 3 March onwards Ms MacDonald continued to work, on fewer hours, as part of the bar staff. She no longer had the responsibilities that she previously had for matters such as ordering, function management and other day-to-day management tasks.

*Misleading information about change of employer*

[18] TKRPL’s second failure of good faith behaviour and fair treatment towards Ms MacDonald was found in what its 10 March letter to her said about its planned changes to the business. The letter did not accurately describe the legal reality of the changes. The inaccurate description had the effect of misleading and deceiving her about the nature of the changes and the basis of the termination of her employment, which was to take effect on 31 March.

[19] At the time that letter was written and given to her, and before the plan went awry, Mr Slack was only buying shares in the TKRPL, the company that was Ms MacDonald’s existing employer. There was no “new company” registered that could operate the business at that time. If there had been and the business was being sold to that new company, there would have been a need to terminate existing employment

agreements and arrange for new employment agreements with that new and different legal entity.

[20] From 10 March and right up to the date Ms MacDonald's employment was due to end on 31 March (under the notice given to her) or up to 2 April when she in fact ended working for TKRPL, no new company was registered. Throughout that time, and afterwards, TKRPL remained as operator of the business and the actual employer of the staff. There was no justified basis for a unilateral termination of all employment agreements, a requirement to reapply for existing jobs, or to sign new employment agreements with the same entity that was already the employer.

[21] Both Mr Mead and Mr Slack were involved in writing the 10 March letter, with its misleading content. However it was apparent from Mr Mead's oral evidence at the Authority that he believed the plan for Mr Slack's purchase of 20 per cent of the shares meant that a "new company" would be operating the business once that plan came into effect on 1 April. At various points in his evidence Mr Mead also referred to plans to change the company name, to change the trading name, and to register a new company. He was unable to provide documentary evidence that a change of company name or registration of a new company was planned or underway because, he said, TKRPL's accountant had changed its records system and destroyed previous records.

[22] While there might have been long term plans to register a new company and structure its shareholding so that, over time, Mr Slack would come to own and operate the bar business and its licenses, the immediate steps were, more likely than not, only to change the trading name that TKRPL used for the pub. At the time it used 'Top Pub' as its trading name but also used the 'Route 26 Bar and Grill' for part of the operation. Mr Slack wanted to have that name used and promoted as a more up-to-date name for the entire venue. Changing only its trading name also meant no immediate changes were needed in respect of the incorporated entity that held the liquor, TAB and gaming licences, that is TKRPL.

[23] The likelihood that only a change to the trading name was really envisaged at that time is supported by the name used for the employer in employment agreements signed by Mr Slack, on 16 February 2015, and by Ms Witte, on 1 April 2015. The front page of both agreements refers only to Route 26 Bar and Grill. The text of their

agreements identified the employer as “Route 26 Bar and Grill/Top Pub”. There is no reference to a new registered entity. Mr Mead accepted, in answer to a question at the Authority investigation meeting, that Route 26 Bar and Grill was the trading name of TKRPL.

*Requiring a letter of resignation*

[24] The third failure of good faith behaviour was the requirement to provide a resignation letter once Ms MacDonald advised Mr Slack that she did not want the new job offered to her on fewer hours and a lower pay rate. Mr Slack asked for the letter because Mr Kemp asked him to get one. It was sought for a misleading purpose. It was sought so that TKRPL could maintain that Ms MacDonald had chosen to end the employment relationship. The reality was that, as stated in the notice it gave in its 10 March letter, TKRPL “terminated” the employment. Despite providing the letter she was asked to give, all Ms MacDonald had done was to decline TKRPL’s offer (under the guise of being a “new company”) to carry on working for it, after 1 April, in a different job that had a lower rate and fewer hours.

**Did the employment end as a result of the employer’s breaches of duty?**

[25] TKRPL’s breaches of its good faith duty to Ms MacDonald directly caused the end of her employment.

[26] Mr Mead’s oral evidence confirmed that Ms MacDonald was offered on-going work at a lower hourly rate than the \$20 an hour she was paid up to 2 April 2015. Ms MacDonald was not prepared to continue working in a role with less responsibility, lower pay and fewer hours, with a resulting drop in income. Although Mr Slack wanted her to stay on as part of the bar staff, and asked her to, it was reasonably foreseeable Ms MacDonald would resign rather than accept the unilateral reduction of role and hours imposed as the result of a proposed change to the business that she was not consulted about.<sup>5</sup> Those breach of duties owed to her meant her supposed resignation, given in a letter she was asked to write by Mr Slack, was really a constructive dismissal as it resulted from those unjustified actions of her employer.

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<sup>5</sup> *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168 at 172.

[27] However the end of Ms MacDonald's employment was also a directly unjustified dismissal. A fair and reasonable employer could not have misled Ms MacDonald, as TKRPL did, that it was necessary to terminate her employment by 31 March 2015 as the result of a new legal entity taking over the business. No such change was, in fact, taking place. The offer of her "current job within the new company" made no difference to the unjustified nature of its action. The on-going employment offered was not really her "current job" as the offer came with reduced terms of employment. Compared with the job she held up to 3 March, it had few hours and less responsibility. Compared with the job she had done since 3 March, the offered job was on lower pay.

[28] The evidence established Ms MacDonald had a personal grievance due to TKRPL's lack of consultation, misleading conduct in terminating her employment and its unilateral reduction of her terms of employment.

## **Remedies**

### *Lost wages*

[29] Ms MacDonald began a new job in a Hamilton restaurant on 13 April 2015 at a better pay rate. About six weeks later she got another job with a similarly better rate and more convenient daytime work hours. The result was that she had lost only around two weeks' wages as a result of her unjustified dismissal by TKRPL. She had made suitable efforts to mitigate that loss by arranging a new job before her employment at TKRPL ended. She had offered to work for TKRPL up to 13 April but, as Mr Slack's oral evidence revealed, Mr Mead directed that Ms MacDonald's employment end on 2 April.

[30] Although Ms MacDonald's lost wage claim was based on a 70-hour week, no evidence confirmed that was her ordinary weekly pay. Mr Mead said the most she had worked was 65 hours and Mr Slack referred to her working 55 hours a week prior to the reduction in her hours once he started work. Using the latter figure, the award for reimbursement of wages lost as a result of the grievance is \$2200, being two weeks for 55 hours a week at the hourly rate of \$20.<sup>6</sup>

### *Compensation for humiliation, loss of dignity and injury to feelings*

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<sup>6</sup> Employment Relations Act 2000, s 123(1)(b) and s 128.

[31] Ms MacDonald gave evidence of sleeplessness, weight loss and a loss of trust in other people as a result of the distress her unjustified dismissal caused her. She also suffered an outbreak of boils for around three weeks. Her friend, Ms Gray, described Ms MacDonald as appearing “crushed” and becoming “really withdrawn” following her dismissal.

[32] Ms MacDonald felt humiliated by how her employment ended. Mr Slack described her as being ‘the face of the bar’ and she was well-known to its patrons in the small town in which she lived. After her employment there ended, she avoided people she knew because she felt embarrassed and she felt she could not look for another job in Morrinsville.

[33] The evidence warranted an award of \$12,000 as compensation for the distress caused to Ms MacDonald by TKRPL actions in ending her employment.<sup>7</sup> This compensation addresses both the injury to her feelings and loss of dignity as a result being removed from and replaced in her managerial role, without proper consultation, as well as the humiliation she felt following the end of the employment. It was a relatively modest sum, in light of the evidence, but set mindful of the need not to keep compensatory payments artificially low.<sup>8</sup>

#### *Contributory conduct?*

[34] No actions of Ms MacDonald contributed to the situation giving rise to her grievance to any extent requiring any reduction of the remedies awarded.<sup>9</sup> She was not responsible for TKRPL’s failures in its treatment of her. She worked for several weeks after finding out about the changes to her job and the notice of its termination. She sought and found alternative employment as soon as she could.

#### **Costs**

[35] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

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<sup>7</sup> Employment Relations Act 2000, s 123(1)(c)(i).

<sup>8</sup> *Hall v Dionex Pty Limited* [2015] NZEmpC 29 at [87] and [90].

<sup>9</sup> Employment Relations Act 2000, s 124.

[36] If they are not able to do so and an Authority determination on costs is needed Ms MacDonald 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 of that memorandum TKRPL would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[37] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate of \$4500, unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>10</sup>

Robin Arthur  
Member of the Employment Relations Authority

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