

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 366
3028074

BETWEEN SOPHIE ALLEYNE
 Applicant

AND BATCHELOR CONSTRUCTION
 LIMITED now trading as HANDRAIL
 SOLUTIONS LIMITED
 Respondent

Member of Authority: Andrew Dallas

Representatives: Michael McDonald, advocate for the Applicant
 Adam Gallagher, advocate for the Respondent

Investigation Meeting: 19 February 2019 with submissions from the Applicant
 received on 25 February 2019 and further information
 received up to and including 20 March 2019

Date of the Determination: 21 June 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Batchelor Construction Limited employed Sophie Alleyne between March 2017 and January 2018 as office administrator and receptionist. Ms Alleyne says she was unjustifiably dismissed as part of a defective restructuring process. This was denied by her former employer.

[2] During the course of Ms Alleyne's employment, Batchelor changed its name. This proceeding has continued under the new company name, Handrail Solutions Limited. For ease of reference that name is referred to throughout this determination.¹

¹ See, Companies Act 2003, s 23(4)(b).

The Authority's investigation

[3] During the Authority's investigation meeting, I heard evidence from Ms Alleyne and for Handrail, managing director, Benjamin Batchelor and contract bookkeeper, Deanne Fox

[4] For reasons that are unclear, Handrail did not lodge or serve any submissions despite being directed by the Authority to do so. In the last communication from Handrail's representative, the Authority was advised: "[the submissions] are with my client and I will lodge them by the end of the week". The Authority heard nothing further nor received anything from or on behalf of Handrail.

[5] Having regard to s 174E of the Act while I have not referred to all the evidence received from witnesses or the submissions advanced by Ms Alleyne's representative in this determination, I record that I have fully considered this material.

Issues

[6] The issues that arose for determination during the Authority's investigation were:

- (i) Was Ms Alleyne's dismissal, and how the decision was made, what a fair and reasonable employer could have done in all the circumstances at the time?;
- (ii) If Handrail's actions were not justified, what remedies should be awarded to Ms Alleyne, considering:
 - (a) Lost wages; and
 - (b) Compensation for hurt, humiliation and injury to feelings; and
- (iii) Should either party contribute to the cost of representation of the other?

What happened?

Relevant context

- [7] Ms Alleyne's redundancy in January 2018 occurred within the context of:
- a. a bullying complaint by her against several male colleagues;
 - b. the imposition of a written warning by Handrail in relation to her interaction with some of those colleagues;
 - c. the challenging of the warning by Ms Alleyne;
 - d. the withdrawal of that written warning through a "stepping back" initiative undertaken by Handrail;
 - e. the non-substantiation of the bullying allegations as a result of an investigation conducted by Mr Batchelor; and
 - f. Ms Alleyne regarded Mr Batchelor's investigation as flawed and not the actions of a fair and reasonable employer.

[8] These events occurred between October and December 2017. Ms Alleyne said they were all related and she drew a further link between them and her redundancy in January 2018. Ms Alleyne said her redundancy was not genuine and was effected for an ulterior purpose. In other words, it was implemented to move on from a troublesome employee.

[9] Ms Alleyne said a key piece of evidence linking her bullying complaint with her subsequent redundancy is found in Mr Batchelor's letter to her dated 4 December 2017 which summaries the outcome of his investigation into her complaint. In the body of that letter, Mr Batchelor states:

.... These situations and as we have got busy, highlight a need to review the role and what we expect or need in terms of delivery of our office administration function in a way that does not unnecessarily tie me up with the administration. These are matters to be addressed outside of this process.

....

[10] Handrail denied this allegation. Handrail said it had acted in good faith and in a manner consistent with its obligations as an employer towards Ms Alleyne. In any event, Handrail said these matters had not been raised with it within 90 days of the alleged action or actions having occurred as required by the Act and it did not consent to them being raised out of time. Further, Mr Batchelor in his evidence during the investigation meeting “strongly” rejected Ms Alleyne’s allegation.

Redundancy proposal

[11] As a result of expansion and cash flow issues, Mr Batchelor said he enlisted the help of his mother and her friend, Ms Fox to help move the business forward.

[12] Mr Batchelor’s mother and Ms Fox advised Mr Batchelor that Handrail needed an urgent “re-boot” in its office management capability. A change to accounting software to more appropriately manage cash flow and debtor issues was recommended. Ms Fox said also advised Mr Batchelor that he needed to employ an experienced office manager.

[13] Mr Batchelor said he decided over the 2017/2018 Christmas/New Year period he needed to re-organise Handrail’s administration and accounts management. Mr Batchelor said he then put together a proposal to disestablish Ms Alleyne’s role and replace it with a more senior office and finance management role.

[14] On 17 January 2018, Mr Batchelor wrote to Ms Alleyne advising her of a proposal to disestablish her role and create an “urgently needed” “senior office management type role”. The letter attached the job specification for a proposed “accounts/administration manager” role and invited Ms Alleyne to review this, while also noting the new role was “significantly different” from her current role. Mr Batchelor then asked Ms Alleyne to consider any other work opportunities available in the business that would be suitable for her and said he would do the same.

[15] The letter invited Ms Alleyne to attend a meeting at 10.30am on 22 January 2017 at what is now known as the offices of his then solicitors. However, Mr Batchelor did not advise Ms Alleyne that his solicitor would be present at the meeting. The letter did, however, advise her to bring a support person or representative.

[16] Ms Alleyne said she felt the proposed disestablishment of her job was in retaliation for the raising her bullying complaint. Handrail denied this.

Consultation meeting on 25 January 2018

[17] The consultation meeting ultimately occurred on 25 January 2018, by which stage Ms Alleyne had obtained representation. The meeting was tape-recorded and a transcript would ultimately be provided to the Authority. At the commencement of the meeting Ms Alleyne's advocate raised concerns about a lack of sufficient information about the reasons for proposed disestablishment of her job to enable Ms Alleyne to provide adequate feedback.

[18] Ms Alleyne said during the meeting no evidence was disclosed for any increased workload nor was any financial information disclosed. Further no consideration was given to retaining Ms Alleyne as her role was not disappearing; rather her work was being given to another person.

[19] Mr Batchelor said neither Ms Alleyne nor her advocate provided any feedback or input during the meeting on the proposal. He said the issue of pre-determination was not raised. The meeting adjourned and Mr Batchelor said he confirmed the proposal to disestablish Ms Alleyne's job and this was communicated to Ms Alleyne and her representative. This decision was subsequently reduced to writing in the form of an email. Ms Alleyne was paid four weeks' pay in lieu of notice.

[20] Ms Alleyne's representative moved swiftly to challenge the dismissal and also raised concerns about the bullying allegations and the sufficiency of Mr Batchelor's investigation thereof. A personal grievance for unjustified dismissal was subsequently raised.

[21] She would subsequently raise concerns about a lack of transparency in the appointment by Handrail of the new accounts/administration manager. Handrail conceded this appointment was made through “contacts” rather than a formal recruitment process.

The Authority’s view of Ms Alleyne’s employment relationship problem

[22] The primary issue before the Authority is whether Ms Alleyne’s dismissal for reason for redundancy was justified. If it is found not to be, remedies in the ordinary course would flow to Ms Alleyne in light of that finding.

[23] The test of justification of dismissal is set out in 103A of the Act. It is not necessary to reproduce the test here other than to say that is applied on an objective basis by considering whether the employer’s actions were what a fair and reasonable employer could have done in all the circumstances.

[24] As to how the test applies in redundancy situations, the Court of Appeal has emphasised the importance of addressing the genuineness of a redundancy decision by showing that a non-genuine redundancy, including one affected for a purpose other than genuine business needs, is unlikely to satisfy the s 103A test². Conversely, the Court said if an employer could demonstrate the redundancy was genuine and that contractual and consultation requirements of s 4 of the Act have been complied with, this would go a long way towards satisfying the test.³

[25] The duty of good faith required Handrail when proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of Ms Alleyne to provide her with access to relevant information and an opportunity to comment on that before any decision was made.⁴ The duty of good faith also required Handrail to consult with Ms Alleyne about the effect on her of changes to its business and making her redundant.⁵

² *Grace Team Accounting Ltd v Brake* [2014] ERNZ 129 (CA)

³ At [85].

⁴ Employment Relations Act, s 4 (1A)(d).

⁵ Employment Relations Act, s 4 (1A)(c).

[26] The Court of Appeal has observed that the focus of the inquiry as to whether an employer such as Handrail has met the test in s 103A of the Act is on substantial fairness.⁶ A key element of that inquiry in Ms Alleyne's redundancy situation is whether Handrail complied with its good faith obligations.⁷

[27] Having considered the factual matrix in this matter within the context of the legal position outlined above, I conclude Ms Alleyne was unjustifiably dismissed by Handrail on 25 January 2018 and I do so for the following reasons.

[28] The context within which Ms Alleyne's dismissal occurred as set out in paragraphs [7] and [9] above is concerning and is suggestive, in and of itself, of a lack of genuineness in the redundancy process. This is reinforced in my view by the single "consultation" meeting occurring at the offices of Handrail's solicitors and the meeting including considerable input from its then lawyer. Indeed the failure to properly disclose this, and the reason for it, was inconsistent with the company's good faith obligations to Ms Alleyne.

[29] It was clear from the evidence the redundancy process adopted by Handrail was hasty and lacked transparency. The restructuring proposal or "re-boot", unsupported by any deeper structural analysis of the business and relying largely, on the evidence, on the opinions and observations of Ms Fox and Mr Batchelor's mother, was effectively finalised before the process commenced. Even if, absent the matters set out paragraph [28] above, that was not the intention of Handrail; it was the practical effect.

[30] Ms Alleyne was given insufficient information to enable her to provide any considered response to Mr Batchelor's proposal. The proposal was accompanied by sparse information, including no real financial information, to give the consultation process meaning. While Mr Batchelor asked Ms Alleyne to consider whether there were any other work opportunities available in the business suitable for her (and that he would do the same), the failure to provide sufficient information to her effectively rendered this meaningless.

⁶ *A Limited v H* [2016] NZCA 419 (CA)

⁷ *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC28 at [60].

[31] On the evidence, I find Mr Batchelor closed his mind to redeploying Ms Alleyne into the new role which, objectively considered, contained significant aspects of her current role. While she may have required some training and professional development to reach the standard required for some aspects of the new role, a fair and reasonable employer would not have automatically closed off the possibility of redeploying her into it.

[32] Ultimately, given likely ulterior motivation for Ms Alleyne's redundancy and, even absent that, the flaws in the process including the failure to comply with the duty of good faith and to properly justify the proposal to make her redundant means Handrail cannot meet the requirements of s 103A of the Act. I find Ms Alleyne was unjustifiably dismissed by Handrail on 25 January 2018.

Remedies

[33] As Ms Alleyne has been found to have a personal grievance for unjustified dismissal, she is entitled to an assessment of remedies.

Lost wages

[34] Ms Alleyne sought lost wages as a result of her grievance. While she did not quantify her claim for lost wages, Ms Alleyne is entitled to, at least, three months ordinary time wages under s 128(2) of the Act; which she is duly awarded.

[35] Subject to any contribution, Handrail must calculate and pay Ms Alleyne three months wages within 14 days of the date of this determination. If there is a dispute as to this calculation, leave is reserved for either or both parties to return to the Authority to have this amount determined.

Other monetary losses

[36] Ms Alleyne also claimed other lost monies arising out of her grievance. In the circumstances, I believe it is appropriate to award her holiday pay on her award of lost wages and any applicable KiwiSaver contributions under s 123(c)(ii) of the Act.

[37] Again, subject to any contribution, Handrail must calculate and pay Ms Alleyne these monies within 14 days of the date of this determination. If there is a dispute as to calculation of these amounts, leave is reserved for either or both parties to return to the Authority to have this amount determined.

Compensation for hurt, humiliation and injury to feelings

[38] Ms Alleyne sought compensation for hurt, humiliation and injury to feelings arising out of the termination of her employment by Handrail. She did not specify a compensatory figure in her statement of problem.

[39] Ms Alleyne said that when she started at Handrail she was a confident and outgoing person who enjoyed her job. However, by the end of her employment she said she hated her job, had lost all confidence, had no self-esteem and was suffering from anxiety. Ms Alleyne said as a result of her redundancy she suffered severe depression for which she had to be medicated and also received counselling. She said she found it difficult to get out of bed or, if she did, venture out of the house. Ms Alleyne said losing her job affected everything: she had no money, no savings and could not provide for all her child's needs. She said some weeks she could not afford to buy bread and milk.

[40] Taking these matters, and guidance from the Court on the awarding of such remedies, into account, I find it is appropriate for Handrail to pay Ms Alleyne \$18,000 under s 123(1)(c)(i) of the Act within 14 days of the date of this determination.

Contributory conduct by Ms Alleyne?

[41] Despite this being a redundancy situation, having found that Ms Alleyne was entitled to remedies for a personal grievance for unjustified dismissal I am required by s 124 of the Act to consider whether she contributed to the situation giving rise to her grievance.

[42] Having assessed the evidence before the Authority, none of it goes near supporting a finding, on the balance of probabilities that Ms Alleyne contributed to the termination of her employment by Handrail. Consequently, no deduction for contribution is needed or necessary.

Costs

[43] Costs are reserved. The parties are invited to resolve the matter between them. If they are unable to do so, Ms Alleyne has 28 days from the date of this determination in which to file and serve a memorandum on costs. Handrail has a further 14 days in which to file and serve a memorandum in reply.

[44] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.⁸

Andrew Dallas
Member of the Employment Relations Authority

⁸ See, *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135.