

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2020] NZERA 27  
3064532

BETWEEN CHRISTINE GWILLIAM  
Applicant

AND TIMBERWORLD  
WARKWORTH LIMITED  
Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Applicant in person  
Simon Cressey, on behalf of the Respondent

Investigation Meeting: 20 January 2020

Submissions and further 21 January from the Respondent  
information received:

Date of Determination: 23 January 2020

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Christine Gwilliam was employed by Timberworld Warkworth Limited, trading as Mangawhai ITM, as an Administration Assistant. On 3 October 2018 she was notified by Timberworld that her position was redundant. She claims her dismissal was unjustified and seeks remedies. Her claim is denied by Timberworld.

**The Authority's process**

[2] On 15 November 2019 the Authority issued a determination addressing the preliminary issue as to whether or not Ms Gwilliam was prohibited from pursuing her personal grievance due to a 90 day trial period contained in an individual employment

agreement (IEA) produced by Timberworld. Ms Gwilliam denied signing the IEA and therefore an investigation meeting was convened to resolve this issue.

[3] The Authority found that the terms of Ms Gwilliam's employment did not contain a trial period and she was not prohibited from pursuing her personal grievance for unjustified dismissal.

[4] A minute was issued setting a date for the hearing of the substantive issue between the parties, as well as timetable directions including for the filing of an amended statement of problem and statement in reply. At Timberworld's request, the date set for the investigation meeting was subsequently adjourned to enable Timberworld's director, Simon Cressey, to appear and/or for Timberworld to engage someone else to appear on its behalf.

[5] As provided for in clause 12 of Schedule 2 of the Act I have proceeded to act as fully in the matter before me as if Timberworld had duly attended or been represented. This included obtaining evidence from Ms Gwilliam in person.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this 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.

### **Issues**

[7] The issues identified for investigation and determination are:

- a. Was Ms Gwilliam unjustifiably dismissed?
- b. If so, what remedies should be awarded?
- c. If any remedies are awarded, should they be reduced, under s 124 of the Act, for blameworthy conduct by Ms Gwilliam that contributed to the situation giving rise to her grievance?
- d. What costs, if any, should the Authority order payable to the successful party?

## **Background**

[8] Mangawhai ITM opened its doors for the first time on 1 August 2018. Ms Gwilliam was employed as one of two administration assistants for the new branch. The other administration assistant did not provide evidence and therefore I shall refer to her as Ms X. Ms X worked on Mondays and Tuesdays and Ms Gwilliam on Wednesdays to Fridays.

[9] On arrival at work on 3 October 2018 Ms Gwilliam's Manager, Rob Cook, told her that there was something he needed to talk to her about. He then proceeded to advise Ms Gwilliam that her position was redundant because "it was not financially justifiable to have Admin staff based in Mangawhai and the Admin work was going to be done from Warkworth." When Ms Gwilliam asked him whether Ms X would continue to be employed, she was advised that Ms X would continue to work two days a week. Mr Cook told Ms Gwilliam she could either work out her two week notice period or be paid in lieu. She chose the latter.

[10] On 3 December 2018 Ms Gwilliam raised a personal grievance for unjustified dismissal. Timberworld replied to this grievance on 13 December 2018 advising her that:

From the commencement of the business from the 1<sup>st</sup> August it soon became apparent that the administration side would have to be handled by the Warkworth Branch as all the processes had to be combined.

Therefore Mangawhai was in effect duplicating the work of the Warkworth Administration and as such we had to make the hard decision to cease the Mangawhai Administration Operation.

[11] The letter went on to address her complaint that she had been the only one made redundant, advising:

During your notice period when you had stopped working at the branch, we had one of our long standing Administration staff in Warkworth resign to move away from the Warkworth Area.

This necessitated Warkworth advertising for a replacement staff member and to be fully trained. This is a critical role so we asked the other Mangawhai staff member if she could stay on doing two days a week until the new Warkworth Administration staff member was fully trained.

[Ms X] also agreed to help us work through this situation by staying on until the end of this year but still only two days a week or less.

## **Issue one: Unjustified dismissal**

[12] In order for Ms Gwilliam's redundancy to be justified, Timberworld must satisfy the requirements set out in s 103A of the Act. This requires an objective assessment of whether Timberworld'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.

[13] To ensure that a redundancy process is procedurally fair, employers must ensure they comply with their good faith obligations contained in s 4 of the Act. In accordance with these obligations, affected employees should be provided with access to information relevant to the continuation of the employee's employment and an opportunity to comment on that information before it makes its final decision. This includes details as to what the criteria for selection for redundancy are and the weight to be applied to those criteria.<sup>1</sup>

[14] An employer is only entitled to terminate an employment agreement due to redundancy if the termination can be genuinely justified on the basis of valid commercial reasons.

### *The process*

[15] I find that the process followed by Timberworld was flawed. There were a number of serious defects in the process followed by Timberworld that undermined the justification for Ms Gwilliam's dismissal.

[16] Timberworld did not meet any of the mandatory considerations set out in s 103A(3) or s 4 of the Act. It failed to consult with Ms Gwilliam before making its decision to disestablish her role, failed to consider alternatives to redundancy, and failed to provide Ms Gwilliam with sufficiently precise information to enable her to respond. This included providing her with any selection criteria that it used to select her position being made redundant over that of Ms X.

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<sup>1</sup> *Jinkinson v Oceania Gold* [2010] NZEmpC 102 at [51].

[17] Timberworld's actions are consistent with a finding that it approached the redundancy with a closed mind. These defects were not minor and did result in Ms Gwilliam being treated unfairly in terms of s 103A(5) of the Act.

*The reason for the redundancy*

[18] The Statement in Reply did not set out any reason for Ms Gwilliam's position being made redundant. However, in response to questions from the Authority, Mr Cressey explained that Ms Gwilliam's position was made redundant as Timberworld had decided it could be run more efficiently by Ms Gwilliam and Ms X's roles being absorbed by the employees working at Timberworld's Warkworth branch.

[19] Mr Cressey said that prior to opening the Mangawhai branch, the Warkworth branch had undertaken all administration work arising from the Mangawhai area, which equated to around 30% of the businesses' sales. Timberworld had expected that, with the opening of a branch in Mangawhai, these sales would increase thereby necessitating the need for an on-site administrator. However, sales were not as high as expected. This he explained, combined with the level of assistance that Warkworth staff were having to provide to Mangawhai, led Timberworld to reach the decision to revert back to the manner it had conducted business prior to the opening of the new branch i.e. to have all administration handled by its existing staff at its Warkworth branch. By having its Warkworth staff perform Ms Gwilliam and Ms X's roles, he said the Company saved the cost of their wages and streamlined its operations.

[20] The difficulty that I have with Mr Cressey's evidence is that it does not accord with the other evidence that I heard.

[21] First, Mr Cook's oral evidence was that cost savings were not considered. He said the primary reason for Timberworld's decision to make Ms Gwilliam redundant was a perceived conflict arising between Ms Gwilliam and Ms X and the difficulty being experienced with them sharing a role.

[22] Second, Ms X's role was not made redundant. She stayed working for Timberworld until at least 31 December 2018. I was not persuaded by Timberworld's evidence that Ms X stayed to provide support when one of its staff in Warkworth resigned. Mr Cook told Ms Gwilliam that Ms X was staying during their meeting on

3 October, which was before this staff member resigned. In addition, Mr Cressey said the Warkworth staff member provided one month's notice and trained a replacement during that period. That being the case, there was no need for Ms X to be retained for the length of time that she was.

[23] Third, Ms Gwilliam and Ms X's duties were not absorbed by the employees working at Timberworld's Warkworth branch. Ms X continued to undertake her normal duties at the Mangawhai branch following Ms Gwilliam's termination and, from payslips I have viewed, also undertook additional days of work following Ms Gwilliam's termination. A member of the Warkworth staff travelled to the Mangawhai office 2-4 days per week to assist with administration.

[24] On balance, I find Ms Gwilliam's redundancy was contrived to mask the appearance that Ms Gwilliam's job had disappeared when the reality was that she was dismissed for other reasons. Even if that was not the case, and her termination was genuinely motivated by operational requirements, her selection was tainted by Timberworld's irrelevant considerations. Had Timberworld been focused more on economic as opposed to personal goals, Ms Gwilliam's dismissal may have been averted altogether - by dismissing somebody else - or it may have been averted in part by retaining Ms Gwilliam with some reduction of hours.<sup>2</sup>

[25] I find Timberworld's decision to terminate Ms Gwilliam's employment agreement due to redundancy was not genuinely justified on the basis of valid commercial reasons.

### *Finding*

[26] I confirm the preliminary indication provided to the parties. Namely, Timberworld's decision to terminate Ms Gwilliam's employment did not fall within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time. I find its decision to terminate Ms Gwilliam's position on the grounds of redundancy was unjustified.

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<sup>2</sup> *Savage v Unlimited Architecture Ltd* [1999] 2 ERNZ 40 (EmpC).

## **Issue two: Remedies**

### *Lost wages*

[27] Section 123(1)(b) of the Act provides for the reimbursement by Timberworld of the whole or any part of wages lost by Ms Gwilliam as a result of her personal grievance.

[28] Section 128(2) provides that I must order Timberworld to pay Ms Gwilliam the lesser of a sum equal to her lost remuneration, or to three months' ordinary time remuneration, where she has lost remuneration as a result of the personal grievance.

[29] In the present case I am not satisfied that the lost remuneration claimed by Ms Gwilliam can all be attributed to her personal grievance. Ms Gwilliam's evidence was that during the period lost wages are claimed, namely the period from 18 October 2018 to 31 December 2018; she did not look for alternative work and instead used the time to care for her grandchild. However, I took from her evidence that part of her reluctance to explore the job market was due to the embarrassment that she felt from being terminated from Timberworld.

[30] In the circumstances I find 6 weeks' lost wages are attributable to her personal grievance. Ms Gwilliam was paid a sum of \$25.00 gross per hour. She worked 25.5 hours per week. Six weeks' wages totals \$3,825 gross.

[31] Timberworld is ordered to pay to Ms Gwilliam the sum of \$3,825 gross for lost wages. Payment of this sum must be made within 14 days of the date of this determination.

### *Section 123(1)(c)(i) Compensation*

[32] Ms Gwilliam gave evidence of the impact of her dismissal. She explained how she had no idea that her position was vulnerable and was shocked when she was informed. She explained how her confidence was affected and how devastated she had felt. She said she was humiliated and struggled to tell family and friends. She worries about her future job prospects given the small area that she lives in.

[33] I am satisfied Ms Gwilliam suffered humiliation, loss of dignity and injury to her feelings. However, not to the extent claimed. Taking into account the duration of her employment and awards made by the Authority in other similar circumstances, I consider the evidence warrants an award of compensation under s 123(1)(c)(i) of the Act in the sum of \$8,000.

[34] Timberworld is ordered to pay Ms Gwilliam the sum of \$8,000 pursuant to s 123(1)(c)(i) of the Act. Payment must be made within 14 days of the date of this determination.

### **Costs**

[35] Ms Gwilliam was unrepresented and therefore does not claim recovery of any legal costs. However, as part of her claim she was required to engage the expert services of Michael Moran to establish that she had not signed the IEA produced by Timberworld. I am satisfied it is reasonable and appropriate that Timberworld reimburse Ms Gwilliam for Mr Moran's costs that total \$825.

[1] In addition, Ms Gwilliam has paid the Authority's filing fee of \$71.56. This fee is an amount reasonably recoverable from Timberworld.

[2] I order Timberworld to pay the combined sum of \$896.56 to Ms Gwilliam within 14 days of the date of this determination.

### **Outcome**

[36] The overall outcome that I have reached is:

- a. Christine Gwilliam was unjustifiably dismissed from her employment with Timberworld Warkworth Limited.
- b. Timberworld Warkworth Limited must pay Christine Gwilliam the following sums within 14 days of the date of this determination:
  - i. The sum of \$3,825 gross for lost wages;
  - ii. The sum of \$8,000 pursuant to s 123(1)(c)(i) of the Act;
  - iii. The sum of \$896.56 for costs.

## **Certificate of Determination**

[37] I direct, pursuant to Regulation 26 of the Employment Relations Authority Regulations 2000, that Ms Gwilliam be provided with a certificate of determination, sealed with the seal of the Authority. This certificate is to record that, within 14 days of the date of this determination, Timberworld Warkworth Limited must pay Ms Gwilliam the following sums:

- a. The sum of \$3,825 gross for lost wages;
- b. The sum of \$8,000 pursuant to s 123(1)(c)(i) of the Act;
- c. The sum of \$896.56 for costs.

Jenni-Maree Trotman  
Member of the Employment Relations Authority