

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 347
3034333 &
3042373

BETWEEN ARADHNA GANESH
Applicant and Respondent

AND HALCYON KNIGHTS NEW
ZEALAND LIMITED
Respondent and Applicant

Member of Authority: Eleanor Robinson

Representatives: Robert Morgan, advocate for the Applicant
Andrew Schirnack, counsel for the Respondent

Investigation Meeting: 18 & 21 August 2020 by Zoom and by telephone

Submissions and/or
further evidence 24 August 2020

Determination: 28 August 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Aradhna Ganesh, claims that she was unjustifiably dismissed by the Respondent, Halcyon Knights New Zealand Limited (HKNZ) when her employment was terminated by reason of redundancy on 22 June 2018.

[2] HKNZ denies that Ms Ganesh was unjustifiably dismissed and claims that her employment was substantively justified and implemented in a procedurally fair manner in all the circumstances.

[3] HKNZ claims by way of a counter claim that Ms Ganesh breached the implied terms contained in the employment agreement between her and HKNZ (the Employment Agreement) by infringing HKNZ's intellectual property rights, and of

confidence, trust and fair dealing, and fidelity. HKNZ further claims that Ms Ganesh breached the statutory duty of good faith which she owed to it.

[4] Ms Ganesh denies that she breached any implied or statutory duties owed to HKNC during the course of her employment.

The Authority's investigation

[5] 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. It has not recorded all evidence and submissions received.

Issues

[6] The issues requiring investigation are whether or not Ms Ganesh:

- was unjustifiably dismissed by HKNZ.
- breached the implied terms of the employment agreement and the statutory duty of good faith she owed to HKNZ.

Background

[7] HKNZ is a specialist executive search and recruitment agency. It recruits for employers across the whole IT sector, including for roles such as IT Sales and Marketing, Digital, Cloud, CyberSecurity, Data and Analytics, Professional Services, Agile Delivery and Technical Support.

[8] The parent company is based in Australia, and has offices in Singapore as well as New Zealand. During the time of Ms Ganesh's employment, Mr Lincoln Benbow was a joint director and a joint shareholder of HKNZ.

[9] In March 2016 Halcyon Knights PTY Ltd, the Australian parent company, had 5 offices and 40 technology recruiters across the Asia-Pacific region. Mr Benbow said that Halcyon Knights PTY Ltd had opened the office in New Zealand, employing Ms Aksana Rusakova and two others on or about August 2017. Ms Rusakova was appointed with the title of Director-NZ in Auckland with responsibility to lead and manage the New Zealand operation of HKNZ in searching and recruiting for IT roles.

Mr Benbow said that HKNZ needed experienced recruiters to expand its operation in New Zealand.

[10] Ms Ganesh was aware of HKNZ from a recommendation made by an existing employee with whom she was acquainted. She applied and was interviewed initially by Ms Rusakova, and subsequently by Mr Lincoln. She was offered employment and commenced work with HKNZ on 8 January 2018 as a Recruitment Consultant on a salary of \$75,000.00 per annum.

[11] Mr Benbow said that Ms Ganesh had been appointed due to her specialist experience gained from having working within the IT recruitment industry since mid-2014.

[12] At the time of her appointment, Ms Ganesh was subject to a six month restraint period in her previous employment. Mr Benbow and Ms Rusakova confirmed that they had been aware of the six month restraint of trade restriction.

[13] Mr Ganesh was provided with an individual employment agreement which provided the following terms and conditions of employment (the Employment Agreement):

6 Trial Period

(a) As you are a new employee your employment will be on a trial period basis for the first 90 days of your employment.

20 Termination of employment

..

(c) Halcyon Knights may terminate your employment by giving the following period of notice depending on service ...

(d) Halcyon Knights may make a payment in lieu of the period of notice, ...

(g) If Halcyon Knights terminates your employment due to redundancy, you will be entitled to the notice period in this clause but no redundancy compensation or other redundancy entitlements.

[14] Ms Ganesh successfully completed the 90 day trial period and said that during her period of employment at HKNZ she had not received any adverse criticism of her performance, and had believed that her performance was satisfactory.

[15] Mr Benbow said that one issue that required addressing in early 2018 was the structure of the HKNZ team in light of a failure to meet budget in 2017. He and Ms Rusakova had discussed the structure throughout the first part of 2017 and Ms Rusakova had sent emails to the HKNZ team on 9 January 2018, 11 April 2018, and 25 April 2018 advising of the ways in which it was intended to improve the HKNZ team performance.

Team Communications January – April 2018

[16] Ms Rusakova said that on 9 January 2018 she emailed the HKNZ team regarding a new segmented business development plan and the target market verticals per consultant. The email stated:

Hi Crew!

As discussed at our planning and strategy meeting last Nov, here is the new, segmented BD plan and the target market verticals per consultant.

...

I'll be talking to you all about this at your next 1-1 re the plan and the strategy to execute this in 2018.

[17] Ms Rusakova emailed the HKNZ team on 11 April 2018 regarding improving collaboration amongst the customer base with the aim of improving the performance of the business. The email stated:

I'm keen to create a collaborative HKNZ Clients List that covers all of our clients that we all 360 Consultants know of/have worked with. ...

At this stage each and one of you has a list that they have been working off which is great.

But the drawback of this is that there is no collaboration or cross-pollination of all the contacts within these clients ...

Next Steps ...

- Next, HKNZ team will meet together for a strategic meeting on Monday 23rd to go thru all the clients with an intend to work out a plan: how we can leverage this moving forward (more details – on 23rd)

...

Exciting times! :)

[18] Mr Benbow said that he had flown over to New Zealand in April 2018 to discuss with the HKNZ team members the framework of HKNZ and the framework and expectations going forward.

[19] Mr Benbow said that the team meetings were: “upbeat” because he believed it was counter-productive in a team environment to focus on the negative failings of each team member, but the focus was instead on how to meet the budget.

[20] On 25 April 2018 Ms Rusakova said she emailed the HKNZ team about a HKNZ Success Plan, stating:

Good evening to my wonderful HKNZ team! ...

The reason for my email today is to just to formalise the fact that **we’re about to kick off a new, better operational model for HKNZ.**

I have spoken with you all about this individually this week so it’s now news, really.

I just wanted to acknowledge your feedback to date and to summarise the new ‘Action Plan/aka Success Plan’ for the HKNZ branch moving forward. ...

Personally I’m super excited about this as it means consistency, it means lots of collaboration, it means much more ‘good news’ in the market about HK and – dah-dah – an undeniable victory of this market.

[21] Ms Rusakova said that the purpose of discussing and redefining the structure of HKNZ was to improve the performance of the business. In addition to the emails following the whole HKNZ team discussions, Ms Rusakova said she held one-on-one meetings with the employees, including Ms Ganesh.

[22] Ms Rusakova said Ms Ganesh must have known from the one-on one meetings which they had that she was not performing against budget.

[23] Mr Benbow said that HKNZ gave feedback on individual and team performance each month with individual statistics against their budget. He said the extent she was underperforming against budget should have been clear to Ms Ganesh.

[24] Ms Ganesh said that she had not been aware that HKNZ was concerned about her performance and had believed that she was performing well because she had never received any negative feedback about her performance, nor had any concerns about her conduct been raised.

[25] She said her performance against budget had been discussed at the one-on-one meetings with Ms Rusakova but Ms Rusakova had not raised any concerns with her, telling Ms Ganesh that Mr Benbow understood the effect her restraint of trade restriction and that it was difficult to build a brand not well known in New Zealand.

[26] Ms Ganesh said that she had not been aware from the regular update emails from Ms Rusakova or the one-on-one meetings that HKNZ was in financial difficulty or that jobs were under threat.

Events during June 2018

[27] Mr Benbow said that HKNZ had experienced a failure to achieve budget during the first half of 2018. Ms Ganesh was achieving sales below her salary level and her role was ceasing to be economically viable. The remainder of the HKNZ team was not securing work, there was little work in the pipeline and there was a projected loss of \$80,000.00 anticipated.

[28] Ms Ganesh said that there had been a HKNZ team weekly catch-up meeting held on 21 June 2018. She said there had been no indication from the direction or tone of the meeting that HKNZ was facing financial difficulty or that her job was in jeopardy as a result.

[29] No performance issues had been raised with her during that meeting.

[30] Mr Benbow said that a decision had been made to restructure the New Zealand operation and consider the viability of the Auckland team members' roles and as a result, he asked Ms Rusakova on 21 June 2018 to arrange a meeting with Ms Ganesh and two other HKNZ team members.

Meeting 22 June 2018

[31] Ms Rusakova said she was instructed by Mr Benbow to arrange a meeting with Ms Ganesh and two others on 22 June 2018. Mr Benbow joined the meeting by Skype.

[32] Ms Ganesh said that she thought it unusual that a team meeting was called for 22 June 2018 when there had been a weekly catch up the previous day to discuss the schedule of current jobs, leads in the pipeline, and strategies.

[33] During the meeting on 22 June 2018 Mr Benbow said that he had explained to Ms Ganesh and the other two HKNZ team members that a decision had been made to restructure HKNZ due to the commercial viability of the branch after evaluating the pipeline of work. He had told the employees that due to the severity of the financial situation they were being made redundant immediately, that they would not be required to work out their notice period, and would be paid in lieu of notice.

[34] Mr Lincoln said that formal notification of the cessation of employment had been sent to Ms Ganesh and he had also instructed that the terminated employees access to HKNZ's computer systems was revoked.

[35] By 3.30 p.m. Ms Ganesh's access to the HKNZ computer systems had been revoked so she was unable to continue to work. She was subsequently paid two weeks salary in lieu of notice.

Counter claim

[36] Ms Rusakova said that on 12 June 2018 Ms Ganesh sent a copy of HKNZ Terms and Conditions of Business by email to her (Ms Ganesh's) personal email address.

[37] Ms Ganesh confirmed that she had sent a copy of HKNZ Terms and Conditions of Business to her personal email address by error. The HKNZ Terms and Conditions of Business had been blank. She had said as soon as she realised what she had done, she informed Ms Rusakova and deleted the email in front of her, also deleting it from her deleted emails folder and said that Ms Rusakova had told her not to be concerned about it.

[38] Ms Rusakova said she did not agree that she was aware that Ms Ganesh had deleted the email.

[39] Mr Lincoln confirmed when questioned that the HKNZ Terms and Conditions of Business emailed to Ms Ganesh's personal email address had been blank.

[40] Ms Rusakova said that Ms Ganesh's work in progress sheet prepared for their one-on-one meeting on 18 June 2018 had shown that Ms Ganesh had signed Terms and Conditions with Toyota Financial Services, and was presenting new candidates to it with a view that candidates were going to be interviewed by it.

[41] Ms Ganesh said she had told Ms Rusakova that she was talking with Toyota Financial Services and it had been open to seeing candidates for a potential BI Business Analyst. As a result she had been sending relevant candidate details to it in line with a common practice in the New Zealand recruitment industry.

[42] Ms Ganesh said she had told Ms Rusakova that she was not going to put it on her work in progress sheet because it was not a 'live' role, but Ms Rusakova had told her to do so because HKNZ was 'light on roles' and it would stop Mr Benbow: 'breathing down her neck'.

[43] Ms Rusakova denied making this comment or telling Ms Ganesh to include the details on her work in progress sheet.

[44] Ms Rusakova emailed Ms Ganesh on 20 June 2018 stating: "Hi Aradhna, Could you please attach the agreed Terms for Toyota Financial to BH, thank you." Ms Ganesh stated by response email that day that she would do so.

[45] Ms Ganesh said that she received no commission in respect to the position at Toyota Financial Services.

Was Ms Ganesh unjustifiably dismissed by reason of redundancy by HKNZ?

[46] Ms Ganesh was dismissed from her employment with HKNZ by reason of redundancy. Justification for dismissal is stated in the Employment Relations Act 2000 (the Act), which at s 103A sets out the Test of Justification as being:

S103A Test of Justification

- 1) For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
- 2) The test is 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 the dismissal or action occurred.

[47] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. An employer must establish that the dismissal was

a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[48] HKNZ's evidence is that in 2018 it was in dire financial circumstances necessitating the immediate termination of the employment of Ms Ganesh and two other employees.

[49] There is evidence that sales were under budget, however despite the alleged financial difficulties of HKNZ, it had employed another recruitment consultant on or about April 2018, shortly before the meeting on 22 June 2018.

[50] Moreover at the time of the Investigation Meeting HKNZ was still a registered company in New Zealand and Mr Benbow confirmed that at the date Ms Ganesh was made redundant on 22 June 2018 HKNZ had not been trading insolvently, in receivership or facing liquidation.

[51] On that basis I find no financial justification for HKNZ disestablishing Ms Ganesh's position, and consequently terminating Ms Ganesh's employment.

[52] Turning secondarily to procedural fairness and whether or not the decision to dismiss Ms Ganesh by reason of redundancy was one a fair and reasonable employer could have made I observe that in a redundancy situation a fair and reasonable employer must, if challenged, be able to establish that he or she has complied with the statutory obligations of good faith dealing pursuant to s.4 of the Act.

[53] Section 4(1A)(c) in particular is relevant to a redundancy situation and requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee to provide to the employee affected:

(i) access to information, relevant to the continuation of the employees' employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before a decision is made.

Access to Information

[54] As noted above, HKNK clearly communicated with Ms Ganesh about various new initiatives during 2018, namely:

- A: “new segmented BD plan and target market verticals” on 9 January 2018;
- A: “collaborative HKNZ client list on 11 April 2018; and
- The: “HKNZ success plan” on 23 April 2018.

[55] However I find that the information provided to Ms Ganesh was limited by the extent and tone of the communications. There is no indication in the communications of financial difficulties being experienced, or that these may have implications for the continuation of her employment.

[56] In addition, I find it was not unreasonable of Ms Ganesh to place what transpired to be erroneous reliance on the ‘upbeat’ nature of the communications by Mr Benbow and Ms Rusakova.

[57] I note that in the email dated 25 April 2018 Ms Rusakova refers in positive terms to: “undeniable victory of this market” and to her being: “super excited” about the introduction of a new refined HKNZ model.

[58] There is no reference in any of the emails sent by Ms Rusakova to Ms Ganesh of the possibility of the termination of her employment on grounds of redundancy.

[59] Nor was there any indication given to Ms Ganesh during the team meeting held on 21 June 2018 that there was a severe impending financial situation being experienced by HKNZ, that the continuation of her employment was in jeopardy, nor was there was any performance issue raised with her during that meeting.

[60] Mr Benbow’s evidence was that HKNZ did not share its : “P & L” with the employees. Further whilst HKNZ states that Ms Ganesh should have been aware of her own sales performance against budget and therefore formed an opinion that the redundancy of her position was inevitable, the law does not require employees to make deductions or guesses about the financial performance of their employer and/or attendant implications for their continued employment. Rather the statutory requirement is that the employee is provided with access to information relevant to the continuation of his or her employment.¹

¹ S4(IA)(c)(i) Employment Relations Act 2000

[61] There is no evidence that Ms Ganesh was provided with access to information indicating that HKNZ was in such severe financial difficulties that her continued employment was in jeopardy.

Opportunity to comment

[62] The duty of good faith requires that an employer provide an employee with the opportunity to comment upon the financial or other information provided by the employer before a decision relating to the employee's continued employment is made.

[63] In *Simpsons Farms Limited v Aberhart* the Chief Judge noted that compliance with good faith dealing includes consultation: "as the fair and reasonable employer will comply with the law"²

[64] I find no evidence that HKNZ consulted with Ms Ganesh prior to terminating her employment on grounds of redundancy.

[65] It is submitted by the HKNZ that the decision to disestablish Ms Ganesh's position was made by the directors of Halcyon Knights PTY Limited, a company registered in Australia, one of which was Mr Benbow, and as such HKNZ merely implemented a decision made by a third party based in Australia and consequently there was no obligation to provide information about or provide Ms Ganesh was an opportunity to respond to the decision to terminate her employment.

[66] Mr Benbow informed Ms Ganesh at the meeting held on 22 June 2018 that her employment was being terminated by reason of redundancy. It was Mr Benbow who was responsible for ensuring that Ms Ganesh's ability to continue working for HKNZ was ended by the revocation of her access to HKNZ's computer systems.

[67] Mr Benbow was a director of HKNZ until his resignation on 31 May 2019 and had clearly taken an active part in the operation of HKNZ. On that basis I find that the decision to terminate Ms Ganesh's employment on grounds of redundancy had been made by a director of HKNZ, Ms Ganesh's employer.

[68] It is also submitted by HKNZ that the economic viability of HKNZ necessitated immediate action such that consultation was not feasible.

² *Simpsons Farms Limited v Aberhart* [2006] ERNZ 825 at [65]

[69] As observed above in paragraphs [49] and [50], the evidence was that despite the alleged financial difficulties of HKNZ, it had employed another recruitment consultant on or about April 2018, shortly before the meeting on 22 June 2018, and had been a registered company in New Zealand, not trading insolvently, in receivership or facing liquidation.

[70] Formal consultation would have avoided any ambiguity in communication by providing unambiguous information about HKNZ's financial position, and the implications for Ms Ganesh's continued employment with HKNZ.

[71] I find that HKNZ failed to follow a fair and proper process.

[72] I determine that Ms Ganesh was unjustifiably dismissed by reason of redundancy by HKNZ

Did Ms Ganesh breach the implied duties in the Employment Agreement and the statutory duty of good faith?

[73] HKNZ claims that Ms Ganesh breached the implied duties she owed to HKNZ during her employment with HKNZ as a result of which it has suffered loss incurred in investigating the alleged breaches.

[74] The first alleged breach is that of Ms Ganesh sending HKNZ Terms and Conditions of Business to her personal email.

[75] The evidence of Ms Ganesh and Ms Rusakova is in direct contradiction in that Ms Ganesh states that she told Ms Rusakova she had done so and deleted the email in front of her, Ms Rusakova denied this had occurred.

[76] Ms Rusakova observed several times during questioning during the Investigation Meeting that the events occurred some time ago and it was therefore difficult for her to recall details. I accept that it is difficult for witnesses to recall events clearly after a significant passage of time.

[77] Ms Ganesh however clearly stated that the HKNZ Terms and Conditions of Business had been emailed to her personal email address on 12 June 2018 were blank and had been sent in error.

[78] Mr Benbow confirmed at the Investigation Meeting that the emailed HKNZ Terms and Conditions of Business emailed by Ms Ganesh were blank.

[79] Moreover I note that the email and attachment was sent on 12 June 2018, however this issue was not raised during the one-on-one meeting between Ms Rusakova and Ms Ganesh held on 21 June 2018.

[80] In the email sent to Ms Ganesh on 20 June 2018 Ms Rusakova asks that Ms Ganesh attach the agreed Terms for Toyota Financial to her work in progress work sheet.

[81] I find that this supports Ms Rusakova being aware by 20 June 2018 that Ms Ganesh had been in discussion with Toyota Financial Services and had emailed the HKNZ Terms and Conditions of Business to it.

[82] I have already noted that this issue was not raised during the one-on-one meeting between Ms Rusakova and Ms Ganesh held on 21 June 2018 and there is moreover no evidence that Ms Ganesh could or did in fact gain any personal benefit from the alleged breaches.

[83] I determine that Ms Ganesh did not breach the implied duties in the Employment Agreement and the statutory duty of good faith.

Remedies

[84] Ms Ganesh was unjustifiably dismissed and she is entitled to remedies

Lost wages

[85] Ms Ganesh is entitled to lost wages. Ms Ganesh obtained temporary alternative employment in July 2018. I am satisfied on the basis of evidence submitted that Ms Ganesh took steps to mitigate her loss and obtain alternative employment after the notification of termination of her employment.

[86] Ms Ganesh was unemployed for a period of two weeks before she obtained temporary fixed term employment. She is entitled to two weeks' pay for that period.

[87] Following that two week period, the temporary employment obtained by Ms Ganesh paid her \$4.80 less per hour than her employment at HKNZ.

[88] **I order that HKNZ pay Ms Ganesh the sum of \$2,884.00 gross (calculated as \$75,000.00 per annum ÷ 52 x 2) in respect of the two week period from 22 June 2018 pursuant to s 128(3) of the Act.**

[89] **I order that HKNZ pay Ms Ganesh the sum of \$2,112.00 gross (calculated as \$4.80 per hour x 40 hours x 11 weeks) in respect of the reduction in hourly rate between her employment at HKNZ and her temporary new employment pursuant to s 128(3) of the Act.**

[90] Ms Ganesh is also entitled to holiday pay in respect of the lost remuneration.

[91] **I order that HKNZ pay Ms Ganesh the sum of \$399.68 as holiday pay (calculated as 8% of \$4996.00) pursuant to s 23 of the Holidays Act 2003.**

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[92] Ms Ganesh is also entitled to compensation for hurt and humiliation.

[93] Ms Ganesh at the time of the termination of her employment with HKNZ was a single mother who was also providing her young niece for whom she was in the process of trying to have custody orders discharged.

[94] Ms Ganesh said that the termination of her employment had adverse implications in regard to her ability to provide for the needs of her daughter or her niece and she was having to consider putting her niece back into foster care before she managed to obtain alternative employment.

[95] This was extremely distressing and stressful for her, and Ms Ganesh said that she had difficulty sleeping and eating, and suffered from anxiety.

[96] I find that the termination of her employment had significant adverse effect upon Ms Ganesh and that she suffered hurt, humiliation and injury to feelings as a result.

[97] **I order HKNZ pay Ms Ganesh the sum of \$18,000.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i) of the Act.**

[98] **All sums ordered are to be made within 28 days of the date of this determination.**

Contribution

[99] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[100] Ms Ganesh did not contribute to the situation which resulted in her dismissal by way of redundancy and there is to be no reduction in the remedies awarded.

Costs

[101] Costs are reserved. Should the parties seek costs, they are encouraged to try to resolve any issue of costs between themselves.

[102] If they are not able to do so and an Authority determination on costs is needed the Applicant 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 the Respondent 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.

[103] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority