

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2021] NZERA 180  
3108552

BETWEEN	ELISABETH SIEGMUND Applicant
AND	MARLBOROUGH TOUR COMPANY LIMITED Respondent

Member of Authority: Michael Loftus

Representatives: Applicant in Person  
Brian Fletcher, counsel for Respondent

Investigation Meeting: 4 February 2021 at Blenheim

Submissions Received: At the investigation meeting

Date of Determination: 3 May 2021

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The applicant Elisabeth Siegmund claims she was unjustifiably dismissed by the respondent, Marlborough Tour Company Limited (MTC). There were, originally, claims of unjustified disadvantage but they related to the manner of Ms Siegmund's dismissal and the parties agreed they be subsumed within the dismissal claim.

[2] MTC accepts it dismissed Ms Siegmund but is of the view it can justify the dismissal as a redundancy attributable to a loss of business caused by the COVID situation.

## Background

[3] MTC manages a number of tourism orientated businesses in the Marlborough region. Included therein are various vessels in the Sounds.

[4] In October 2019, Ms Siegmund approached MTC seeking possible employment on one of those vessels. She says she did so on the basis she knew and accepted the employment would be seasonal and would finish toward the end of summer. As events transpired, she was offered a job as a deckhand on the Pelorus mail boat.

[5] The mail boat operates year round with a summer schedule that sees it sail seven days a week and a winter schedule which normally sees it sail three days a week – Monday, Wednesday and Friday. Ms Siegmund was rostered to work a four day on/three day off roster.

[6] The employment agreement, which was provided after commencement, states the employment was fixed term due to the seasonal nature of the work and would end on 31 May 2020. Ms Siegmund states the cessation date was never actually discussed but accepts she did not query it as it was in accordance with her expectations.

[7] Here it should be noted that Ms Siegmund does not live locally and returned to her distant home on her days off.

[8] Things went well until March 2020 with the company praising Ms Siegmund as an employee and she being appreciative of the learning opportunities she received. Unfortunately, COVID then struck. This created difficulties for the company as while it ran regular mail and freight deliveries to properties in the Sounds, its business was reliant on tourists, particularly those who came off cruise ships whose arrival was banned with effect 15 March. This decimated MTC's client base.

[9] On 15 March MTC sent a message requesting all staff attend a meeting at 8:00am the following morning so as ... *to talk through the initial impact of the Government's decision (14-day quarantine for anyone entering the country and no cruise ships) on MTC Group and how we move forward sustainably as a business.*

[10] Three simultaneous meetings were held but unfortunately, and due to the fact it was a rostered day off, Ms Siegmund did not attend. In MTC's view the situation was put, questions answered and staff asked to provide feedback. One of those who attended was Bindi Taylor,

the recently appointed Havelock Manager. She says the message was *things are going to change*, questions were answered and staff were told to get in touch with HR.

[11] The points made at the meeting were then summarised in a further email sent to all staff early afternoon on 16 March. Under the heading ‘What’s Happened’ it says:

The Government announced Saturday evening that all people arriving in New Zealand (including returning Kiwis) are now required to self-isolate for two weeks, and cruise ships are not permitted to enter New Zealand to minimise further outbreaks of COVID-19 Coronavirus.

[12] The company first acknowledged the efforts of staff during what was termed a busy summer season before outlining “our plan going forward”. Staff were advised that amidst other things, this plan includes:

Scaling down to a winter schedule across all our businesses – fewer tours, cruises and water transport options. This will have an impact on staffing, and also on existing bookings.

[13] The document then commented on the fact it was uncharted territory and there was considerable uncertainty about what the future held before closing with:

This week, as more information comes to hand, we will be looking to make decisions that are in the best interests of the company to put it into a sustainable position going forward. We welcome your input on this. Please direct feedback to Sue and Nicky.

[14] There then followed a number of questions that had been posed at the meetings along with answers.

[15] Two days later a further memorandum was sent to staff. It commented on the fact the Government had just announced a support package but added:

From what we have read so far and understand – from a business and wage subsidy perspective, the package aid doesn’t appear to support a seasonable tourism business like MTC that has grown over the past year. We are seeking further guidance, but it is looking likely that we won’t qualify for Government assistance.

[16] The email went to say that given a major decline in business and little likelihood of Government support *There is unfortunately no way we can avoid an impact on staffing*.

[17] The email went on to say:

We intend to continue operating Marlborough Tour Company Group, but on a scaled back basis. MTC and Pelorus Mail Boat will be going into winter hours from the beginning of next – Monday 23 March. We will let you know the finer details of this soon...

We are reviewing staffing at present and will speak to staff individually over the remainder of the week, to discuss your role and to get your input.

[18] On 21 March, Ms Siegmund was crewing on the mail boat in accordance with her roster. It is common ground that during the day she received a text from Ms Taylor asking when the boat would return and replied advising approximately 4:00pm.

[19] Ms Siegmund says that when the boat returned to Havelock, Ms Taylor came aboard and almost immediately said to her, “that was your last day mate”.

[20] While Ms Taylor cannot remember the exact words, she accepts that is probably correct or very close to. That said, she says her comments should be taken in context. She says having come aboard she suddenly remembered that Ms Siegmund was on leave the following day and as they were then going to a winter roster, she would not be returning. Ms Taylor reflects that she and Ms Siegmund had become friends (Ms Siegmund agrees) and having realised it was potentially the last time they would see each other, the comment was justified.

[21] Ms Taylor says they gave each other a hug before she said “If you’ve got any questions, give me a ring but go to HR”. Ms Taylor says Ms Siegmund replied, “I’ll have to look at my contract and go that way”. Ms Siegmund agrees there was nothing malicious about the way the comment was uttered but states she took it as confirmation of her termination. Both agree Ms Taylor then offered to clean the boat for Ms Siegmund, who returned to her lodgings, packed up and headed home.

[22] It is also common ground that on the morning of 21 March, Sue Clarson, MTC’s Human Resources Advisor, left a message on Ms Siegmund’s phone around 10:00am asking the latter ring her. Ms Clarson says the purpose of the call was to commence a consultation process but as events transpired, Ms Siegmund was unable to return the call that day. She did so the following morning, 22 March.

[23] While they express it in different ways, both are in essential agreement that the conversation was long and canvassed some suggestions Ms Siegmund made for improving the business. It also canvassed what MTC says was Ms Siegmund’s potential redundancy but in this respect the parties disagree, at least in respect to the context. Ms Siegmund says she expressed acceptance of the fact she had been terminated and Ms Carlson expressed relief at her attitude given she had had a number of difficult conversations that day and already copped

a lot of grief. Ms Siegmund says she adopted the approach she did in the belief she had already been dismissed by virtue of the words uttered by Ms Taylor the previous day.

[24] Ms Clarson accepts Ms Siegmund appeared accepting of the situation but says that was in the context of knowledge gained by way of her previous career as a specialist in systemic organisational failure. She says she was of the view Ms Siegmund must have therefore understood the situation, accepted there were no viable alternatives and therefore had no input to make before a final decision was made.

[25] It would be fair to conclude the two were talking at cross purposes. The following day Ms Clarson rang Ms Siegmund again. She says she did so to convey the final decision which was almost inevitable given the lack of input or a suggestion of alternatives from Ms Siegmund the previous day. Ms Siegmund, operating on the belief she had already been terminated, says the call surprised her and was relatively short. She questioned why Ms Carlson was talking about the end of employment again as this confused her given she'd already been dismissed and had basically accepted it. Ms Siegmund says she simply said, "email me" which then occurred.

[26] The subsequent letter referred to the Government's instruction regarding border closures which had forced the cancellation of MTC's tourism products. It then went on to say:

Your fixed term employment is based on the business requirements and rostered according to the product demand. As there is now no demand for the touring products, we no longer have regular work for you.

As such, the company is in a position of "force majeure" and this letter serves as notice that your fixed term contract with Marlborough Tour Company will be made redundant on Monday 6 April. You will be paid your contractual hours for two weeks, up until that date.

[27] It was the reference to two weeks' notice that was the cause of subsequent problems. Ms Siegmund's contract provided for four weeks' notice and she took issue with what she saw as the incorrect provision. By email later that day, she asked for four weeks' notice.

[28] The company responded on 26 March. Amidst other things, the response advised MTC was acting on legal advice and relying on the concept of frustration given it could no longer offer work due to circumstances beyond its control. It goes onto advise:

Given the COVID-19 situation is of no fault of either party and completely out of our control, our legal advice was to make fixed term contracts redundant as part of a company restructure for sustainability. Within the terms of the

contract we have a redundancy clause, which offers no compensation. We have given two weeks' notice period as per our legal advice and served this as a reasonable notice period under the extreme circumstances.

[29] On 2 April things changed again and the company, having unsuccessfully tried to telephone Ms Siegmund, sent a further email. It advised the Government had amended the wage subsidy scheme and fixed term employees such as Ms Siegmund, were now eligible for a wage subsidy. The email advised that while the situation with respect to future work opportunities had not changed, there was now an opportunity to choose between two following options. The first was a continuation of the status quo where:

Your fixed term contract continues to be made redundant as of Monday 6 April 2020 and in which case a final payment, including four weeks in lieu of notice, would be deposited on 8 April.

[30] The second option was that the redundancy be reversed and the employment continue to the original expiry date of 31 May but on condition that Ms Siegmund agree to a variation under which her pay would reduce to the subsidy amount. Here it should be noted that according to the company, this would have resulted in a total loss of some \$353.60.

[31] Ms Siegmund replied rejecting either option and asked that she be paid as normal until 6 April and then receive four weeks' notice. Ms Carlson responded saying she was disappointed as she felt Ms Siegmund was not acting in her own best interests.

[32] When giving oral evidence, Ms Siegmund gave two reasons for her decision. The first was that she had, by this stage, lost all trust in MTC and no longer wished to deal with them. The second was that she had a philosophical aversion to accepting Government money and is of the view that had MTC paid what she thought it should she would have had sufficient for her needs.

[33] A formal grievance was then raised and the issues have remained unresolved.

### **Discussion**

[34] As already said, Ms Siegmund claims she was unjustifiably dismissed. MTC is of the view it was left with no choice due to Covid and can justify its decision.

[35] Here, and before proceeding further, it should be noted MTC made it clear that despite the correspondence which passed between it and Ms Siegmund it was not relying on frustration to justify the termination though for completeness I record such an argument would not have succeeded in any event. That is because frustration should only be relied upon where the

employment agreement did not make adequate provision for the situation which arose.<sup>1</sup> In this case the defence is redundancy. The employment agreement makes mention of redundancy and in any event the statutory provisions, including dealing in good faith, are imported into the agreement.<sup>2</sup>

[36] It is essentially those requirements, and particularly the good faith provisions, that will determine this matter. Those provisions require that an employer considering an action which might have an adverse impact on an employees' continuing employment must give that employee access to relevant information and an opportunity to comment before the decision is made.<sup>3</sup>

[37] Here reference needs to be made to the above chronology above and while I note MTC argues Ms Taylor did not have ostensible authority to dismiss Ms Siegmund I conclude that as she was the manager who organised Ms Siegmund's work on a day to day basis the latter was entitled to interpret her comments on 21 March as confirmation her employment was to end.

[38] At that point in time the type of consultation required by the Act's good faith provisions had not occurred and when it did the process was truncated as a result of the earlier events. As already said, Ms Clarson and Ms Siegmund were talking past each other with the evidence showing Ms Clarson did not consult in the manner envisaged by the Act. In all fairness to her this was because Ms Siegmund accepts she was by then accepting of her fate but that was because she thought she had already been dismissed.

[39] MTC's problem is, notwithstanding that, it carries a duty to consult in the manner envisaged by the Act. It did not do so and as a result failed to ascertain there was a misunderstanding. It then exacerbated the situation by later proffering the unsustainable argument of frustration and then failing to at least explain its approach to notice, which was to assume dismissal actually occurred on the date it was advised.

[40] This then led to the parties continuing to talk at cross-purposes and as a result they failed to address the real issues. It is the employer's responsibility to remedy these deficiencies and its failure to do means the dismissal must be unjustified.

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<sup>1</sup> *A Worker v A Farmer* [2010] NZCA 547 at [21] and [22]

<sup>2</sup> Above n 1 at [21]

<sup>3</sup> Section 4(1A)(3) of the Employment Relations Act 2000

[41] The conclusion the dismissal is unjustified leads to the question of remedies. Ms Siegmund originally sought two weeks wages (being the balance of her notice period), compensation and costs.<sup>4</sup> The parties also discussed penalties but I take that no further as one was not sought in the pleadings.

[42] The evidence is the wages claims has since been paid and here I note it may be misconceived in that it assumes notice ran from 6 April and not 23 March which was the date upon which notice was given. If any balance remains outstanding it should be paid.

[43] Here I should also note a further issue arose, albeit at my instigation on the belief it could affect remedies. That was the issue of the veracity of the fixed term agreement, as the express termination date did not reflect the season as described in some of the documentary evidence, along with a couple of other indicators contained therein. My concerns were further exacerbated when the oral evidence made it clear that the termination date recorded in the employment agreement was never discussed between the parties.

[44] Having said that, and after considerable discussion during the investigation, I will take this matter no further. I do so for the following reasons:

- (a) There was never any claim in this regard or for the residue of the fixed term;
- (b) Ms Siegmund openly concedes the operation is seasonal. She sought a seasonal job and had no expectation of ongoing employment; and
- (c) Perhaps most importantly, Ms Siegmund concedes that personal considerations would have precluded her working the boats' winter schedule in any event.

[45] Turning to compensation. No amount was specified but Ms Siegmund's evidence made it clear she was hurt by the lack of consultation and subsequent events, which destroyed her previous trust in MTC. That said, her evidence was largely devoid of the type of comments I would normally expect in support of a claim for compensation though there was also evidence of hurt emanating from the fact she was now precluded from pursuing a new career for which she had put considerable effort in preparing herself for.

[46] Having considered the evidence and current award levels, I consider \$8,000 appropriate.

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<sup>4</sup> Statement of Problem at [3]

[47] Having concluded Ms Siegmund was unjustifiably dismissed and remedies accrue I must also consider whether they should be reduced due to contributory conduct.<sup>5</sup> The answer must be no. MTC's justification is redundancy and redundancy is, by definition, a no-fault situation.

### **Conclusion and Orders**

[48] For the above reasons I conclude Ms Siegmund has a personal grievance in that she was unjustifiably dismissed.

[49] As a result I order the respondent, Marlborough Tour Company Limited, pay Elisabeth Siegmund, the balance of her notice period (4 weeks from 23 March) if that has not already occurred and \$8,000.00 (eight thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[50] Costs are reserved. It is for the parties to discuss this but failing agreement and should Ms Siegmund wish to apply to the Authority for a contribution toward costs she should do so no later than 31 May 2021.

Michael Loftus  
Member of the Employment Relations Authority

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<sup>5</sup> Section 124 of the Employment Relations Act 2000