

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 178  
3109732

BETWEEN	BARBARA CORTES Applicant
AND	KERRY JOANNE SEMIZ First Respondent
	RAMAZAN SEMIZ Second Respondent
	TURKMANS LIMITED Third Respondent

Member of Authority:	Leon Robinson
Representatives:	Malvern Gwizo, advocate for the Applicant Aynaz Nowparvar and Kimberley Alford, advocates for the Respondents
Investigation Meeting:	22 July 2021 at Auckland
Submissions received:	28 July 2021 and 15 August 2021 from Applicant 4 August 2021 from Respondent
Determination:	3 May 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Ms Barbara Cortes (Ms Cortes) claims that the respondents “unilaterally terminated [her employment] by validating a resignation notice that was no longer valid”. She also claims she was unjustifiably disadvantaged in her employment because of her employers’ failure to provide her access to the Government’s COVID-19 wage subsidy claimed on her behalf. It is also claimed that the employers breached the duty of good faith owed to Ms Cortes because they failed to engage with her representative

and were unresponsive, failed to attend mediation and failed to identify Ms Cortes' correct employer. The employers deny Ms Cortes's claims.

[2] The parties were unable to resolve the employment relationship problem between them by the use of mediation. Ms Cortes asks the Authority to find that she has personal grievances and to resolve those personal grievances by formal orders for reimbursement and compensation.

### **The Authority's investigation**

[3] For the Authority's investigation written witness statements were lodged by both parties. All witnesses answered questions under oath or affirmation from the Authority and the parties' representatives. The representatives also gave closing submissions.

[4] This determination has been issued outside the timeframe set out at section 174C(3)(b) Employment Relations Act 2000 (the Act), where the Chief of the Authority considers exceptional circumstances exist. As permitted under section 174E of the Act, not all the evidence or information received has been recorded. Rather, this determination makes findings of fact and law and sets out conclusions on the issues necessary to dispose of the Applicant's claims.

### **The issues**

[5] The issues requiring investigation and determination were:

- (a) who was the employer?
- (b) was Ms Cortes dismissed? and if she was;
- (c) were the employer's actions and how the employer acted, what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred?
- (d) was Ms Cortes disadvantaged in her employment by some unjustifiable action on the part of the employer?
- (e) did the employer fail to act in good faith towards Ms Cortes?
- (f) if the employer's actions were not justified, what remedies should be awarded, considering:
  - Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and

- Compensation under s123(1)(c)(i) of the Employment Relations Act 2000; and
- (g) if any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by the employee that contributed to the situation giving rise to the employee's grievance?
- (h) should either party contribute to the costs of representation of the other party?

*Who was the employer?*

[6] I find that Ms Cortes was employed by the First and Second Respondents Mr Semiz and Mrs Semiz in their GoodHub Eatery. The terms of the employment were recorded in a written employment agreement signed on 11 January 2020.

[7] Mr Semiz and Mrs Semiz have been employers in the hospitality industry for more than twenty-eight years.

*Was Ms Cortes dismissed?*

[8] Ms Cortes came to New Zealand from Chile on a work visa. On or about 18 February 2020 she commenced employment with the First Respondent and the Second Respondent initially as a Kitchen Hand and later as Second Chef.

[9] In late March 2020, Ms Cortes says she decided to proceed with plans to leave New Zealand. With the advent of the COVID-19 pandemic she had concerns about her plans and decided that she would discuss the situation with Mr Semiz. She did not wish to be stuck in New Zealand without employment if she resigned and was then unable to travel. She was not entitled to access welfare assistance.

[10] Mr Semiz says that when Ms Cortes advised her plans, she was asked why she had not told them of her plans before she was employed. He says she said "sorry about that". He says that he, Mrs Semiz and the head chef asked her not to resign. The employers had supported Ms Cortes to have her visa varied so that she could work for them.

[11] Ms Cortes says that when she spoke with Mr Semiz he was categorially clear that if she resigned and was then unable to travel due to COVID-19, her employment would continue. She says that on the basis of that assurance she tendered her resignation by email on 16 March 2020:

I wish to inform you that am resigning from my position as Second Chef at Goodhub eatery. I enjoyed my time working in the café, I learn a lot of things, but I have decided to take some time away from work to travel abroad. My last day will be on April 25<sup>th</sup> 2020. I would like to thank you for having me as part of your team, I am proud to have worked for Goodhub and I appreciate the time and patience you have shown in training me.

[12] Mr Semiz acknowledged Ms Cortes' resignation by email on 20 March 2020.

He wrote:-

Thank you for your letter, I accept your resignation letter. Talk to you soon. Cheers.  
Ramazan Ray

[13] As countries began to close their borders international air travel became increasingly restricted. Ms Cortes was unable to arrange international flights for her intended travel plans.

[14] On 19 March 2020 Ms Cortes says that she asked Mr Semiz to disregard her resignation letter because she was unable to arrange flights. She says that he told her "Yes, No problem. you can still work, advise Kerry too". She then says that she immediately told Mrs Semiz the same information and in reply Mrs Semiz merely enquired of Mr Semiz's response. Apparently Mrs Semiz confirmed her agreement when she was told her his response. Ms Cortes also says Mrs Semiz commented "I told you it was difficult to travel now".

[15] Mr and Mrs Semiz successfully accessed the Government's COVID-19 wage subsidy scheme in respect of their employees including Ms Cortes.

[16] On 25 April 2020 Mr Semiz emailed Ms Cortes:-

Hi Barbara I hope you are doing well, difficult times for all of us during COVID19 and lockdown level 4. As you know according to your resignation letter today is your last day of employment and your resignation letter still stands during Covid 19 lockdown level4 as we have discussed. Once we are in Level 2 than we have to have a discussion together for your departing date from Downbeat-Goodhub. Looking forward to working with you during this period of time. Kind Regardsd  
Ramazan Semiz Ray Goodbeat-Downbeat 326 Hibiscus Coast Highway Orewa

[17] Ms Cortes emailed Mr Semiz in response:-

Hi, Ray as we spoke with you and Kerry, I decide to stay working in goodhub, because it is not moment for travel and do other things. I though we were ok because I already spoke with Kerry and she was ok with this.

[18] Mr Semiz responded by email again that same day:-

Hi Barbara. As my reply email to you on March 20th I did accept your resignation, your resignation date still stands that we went in to a lockdown. See you soon at work. Kind Regards Ramazan Semiz Ray

[19] Ms Cortes responded again that same day by email:-

Sorry Ray I don't understand. I'm not leaving, because I spoke with Kerry about it, but you tell me that you accept my resignation so I have to leave the job?

[20] Mr Semiz replied by email that same date again:-

Hi Barbara Please read and understand this email that I have send to you email below – see you soon – have a good night

[21] On 29 April 2020 Ms Cortes spoke with Mr and Mrs Semiz. Following the email sent to Ms Cortes on 25 April 2020, Mrs Semiz told her that her last day of work would be 10 May 2020.

[22] Ms Cortes responded by asking for her last day of employment to be 27 May 2020. That date was agreed. It was confirmed by email sent to her that evening:-

Hi Barbara. Thank you for coming to work today. It was good to talk to you with Kerry. As she has mentioned your last day of employment will be 10th of May 2020 at Goodhub Eatery-Downbeat. Than(sic) you have asked Kerry that if you can finish working with in four weeks from today. There fore your last working day at Goodhub-Downbeat will be 27th May 2020. So far we know from the New Zealand Government we will be in level 2 with in two weeks from 28th April 2020. I have not informed immigration about your resignation. We hope we have a enjoyable and safe working environment until your last day. Kind Regards Kerry Joanne and Ramazan Semiz (Ray)

[23] By letter of 30 April 2020 Mr Taz Mukorombindo of the Canterbury New Zealand Business Association wrote to Mr Semiz on Ms Cortes behalf stating that there was no valid resignation to legally effect. He wrote that it been agreed to negative Ms Cortes resignation. He also wrote that the correct way to terminate Ms Cortes' employment was by way of restructure and that his organisation could help with that process if assistance was needed.

[24] Mr Mukorombindo wrote again to Mr Semiz by letter dated 7 May 2020. He advised that Ms Cortes suffering anxiety about the situation. He invited constructive engagement and invited the employer to attend mediation. He advised Ms Cortes would pursue a personal grievance for unjustifiable dismissal if her employment was terminated.

[25] On 6 May 2020 Ms Cortes sought the assistance of the Labour Inspector about the termination of her employment and good faith. The Labour Inspector's involvement did not resolve matters.

[26] Ms Cortes employment with Mr and Mrs Semiz at Goodhub eatery ended on 27 May 2020.

*Was Ms Cortes dismissed?*

[27] Ms Cortes initially did resign. She did so in writing. But she later sought her employer's agreement to permit her to resile from that resignation. I accept Ms Cortes evidence that Mr Semiz had expressly agreed and had tasked Ms Cortes with informing Mrs Semiz of his agreement on their behalf. Ms Cortes did inform Mrs Semiz as she had been instructed to do. That is what Ms Cortes referred to in her emails to Mr Semiz about 'speaking to Kerry'.

[28] I accept Ms Cortes evidence and it is corroborated by the contemporary documentary evidence in the emails between Ms Cortes and Mr Semiz. That being so, Mr Semiz purported to resile from the agreement that he had made with Ms Cortes. When Ms Cortes asked if by his correspondence she had to leave the job, he confirmed it by referring her explicitly to his email where he stated her resignation date stands.

[29] I draw an inference from the evidence that Mr and Mrs Semiz were not pleased that Ms Cortes had been hired and her work visa changed only for her to resign weeks after she had started. If I accept their evidence that they asked her to stay only to receive her confirmed resignation, I draw a further inference that would not have pleased them either. I consider it is likely that Mr Semiz was moved not to honour the agreement he had reached with Ms Cortes for these reasons.

[30] In this equity and good conscience jurisdiction and in these circumstances, Mr and Mrs Semiz are not permitted to resile from the agreement they had reached to allow Ms Cortes to resile from her resignation. I conclude then that Ms Cortes had secured from her employers their agreement that her resignation not stand. It follows then that when her employers told her that her last day of employment was 27 May 2020, that was a sending away that amounted to a termination.

[31] I conclude that Ms Cortes was dismissed.

*Was the dismissal unjustifiable?*

[32] The dismissal was unjustifiable because a fair and reasonable employer would not have resiled from an agreement it had made with its employee in the same circumstances that this employer did.

*Unjustifiable disadvantage?*

[33] I do not accept that Mr and Mrs Semiz improperly retained a Government COVID-19 wage subsidy obtained on Ms Cortes behalf. The evidence is that the employers notified the Ministry of Social Development of Ms Cortes' resignation and enquired of what was required of them in relation to the subsidy they had received.

[34] The Ministry of Social Development advised the subsidy was to be retained and allocated amongst other employees.

*Breach of good faith?*

[35] I find that Mr and Mrs Semiz in failing to honour the agreement to let Ms Cortes rescind her resignation acted in breach of the duty of good faith they owed to her.

[36] I accept that it was reasonable for Mr and Mrs Semiz to take the view they could not have confidence in the Canterbury Business Association in order to justify their engagement with it.

**The outcome**

[37] I find that Ms Cortes has a personal grievance for unjustifiable dismissal and, that Mr and Mrs Semiz did not act in good faith towards Ms Cortes.

**The resolution**

[38] Ms Cortes is entitled to remedies to resolve the personal grievance for unjustifiable dismissal.

[39] I must first consider whether there was any blameworthy conduct on Ms Cortes' part which contributed to the situation that led to the personal grievance I have found. I find that there was no such blameworthy conduct on Ms Cortes's part and there is no basis to reduce either the nature or the extent of any remedies to be provided to her.

### *Reimbursement*

[40] I am satisfied that Ms Cortes has lost remuneration as a result of the unjustifiable dismissal. I am satisfied too that Ms Cortes mitigated her loss by actively seeking other employment not being entitled to access welfare assistance. I award her three months income as reimbursement.

[41] I order Ramazan Semiz and Kerry Joanne Semiz to pay 3 months lost wages in the gross sum of \$10,368.00 (Ten thousand three hundred and sixty-eight dollars (\$21.60 x 40 hours x 12 weeks)) to Barbara Cortes as reimbursement and to do so within 28 days of the date of this determination.

### *Compensation*

[42] Ms Cortes gave evidence that she suffered considerable stress and anguish by reason of the way her employer behaved towards her. She said she was very stressed about the situation her employers left her in when they made her leave her employment. She was away from her home country and had very limited support networks in New Zealand. She described experiencing a Bell's palsy condition as a result of the way the employers treated her.

[43] I am satisfied that Ms Cortes has suffered hurt and humiliation, loss of dignity and injury to her feelings as a result of the unjustifiable constructive dismissal. Having regard to the nature and circumstances of the personal grievance, the period of the employment and the particular evidence given by Ms Cortes, I order Ramazan Semiz and Kerry Joanne Semiz to pay to Barbara Cortes the sum of \$5,000.00 (Five thousand dollars) as compensation and to do so within 28 days of the date of this determination.

### **Costs**

[44] The parties are encouraged to resolve any issue of costs between them. If they are not able to do so Mr Gwizo is to lodge and serve a memorandum on costs within 14 days of the date of this determination. From the date of service of that memorandum Ms Nowparvar will have 14 days to lodge any reply memorandum. I will not consider any memorandum submitted out of time without leave.

Leon Robinson  
Member of the Employment Relations Authority