

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 337
3136483

BETWEEN CLAUDETE SILVA
 Applicant

AND TE RITO FOUNDATION
 First Respondent

AND RAEWYN KAPA
 Second Respondent

Member of Authority: Andrew Gane

Representatives: Gerardus Elwell, counsel for the Applicant
 Raewyn Kapa for the Respondents

Investigation Meeting: 07 April 2022 at Auckland

Submissions and further 19 April 2022
Information received from
Applicant and Respondent:

Date of Determination: 20 July 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Claudete De Silva commenced work at Te Rito Foundation Limited (the Foundation) on 8 July 2020 as an executive assistant hired by Raewyn Kapa, the chief executive of the Foundation. Ms De Silva brings a claim of unjustified disadvantage and unjustified dismissal on the basis that the Foundation unilaterally and unlawfully reduced her working hours. On 28 October Ms De Silva left working at the Foundation after having earlier resigned on 14 October.

[2] The Foundation says Ms Kapa made an executive decision when it reasonably and lawfully reduced Ms De Silva's hours of work.

The Authority's investigation

[3] There is some procedural history to this matter to be recorded.

[4] Both the Foundation and Ms Kapa did not file a statement in reply within the statutory 14-day period following service of Ms De Silva's statement of problem in the Authority.

[5] At the case management conference on 18 November 2021 the Authority gave leave to both the Foundation and Ms Kapa to lodge and serve statement (s) in reply out of time however they had to be lodged and served no later than Thursday 2 December 2021. The Authority also directed the parties to attend mediation. The Foundation and Ms Kapa failed to comply with the directions to provide relevant documents within the timetable set in the 18 November minute.

[6] A further case management conference was held on 9 February 2022. The Foundation and Ms Kapa did not take part in the call. The Authority made directions for the parties to lodge with the Authority and serve statements of evidence and any other relevant documents not already before the Authority

[7] The parties attended an investigation meeting on 31 March 2022. At the close of the meeting a timetable was set with the agreement of the parties to file written submissions.

[8] 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. In determining this matter the Authority has carefully considered all the material before it, including all evidence of the parties and their submissions.

Issues

[9] The issues requiring investigation and determination are:

- (i) was Ms De Silva unjustifiably disadvantaged?
- (ii) was Ms De Silva constructively dismissed?
- (iii) if so, was this justified?

- (iv) if Ms De Silva was unjustifiably dismissed what remedies should she be awarded considering compensation under section 123(1)(c)(i) of the Act?
- (v) if any remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct by Ms De Silva that contributed to the situation giving rise to his grievance?
- (vi) does the Foundation owe Ms De Silva arrears of wages and holiday pay?
- (vii) if there are arrears of wages and holiday pay should interest be paid on those amounts?
- (viii) did the Foundation breach the terms of the employment agreement?
- (ix) did Ms Kapa aid and/or abet the Foundation's breaches?¹
- (x) if a breach is established is a penalty warranted?
- (xi) should either party contribute to the costs of representation of the other party?

Background

[10] Ms Kapa is the original founder of the Foundation based in Auckland City, Tāmaki Makaurau. The company was developed from grassroot community research and development initiatives and strategies to improve the operations and treatment of parents of children in state care in New Zealand

[11] On 8 July 2020 Ms Kapa employed Ms De Silva to the role of executive assistant to support her role as chief executive.. The offer of employment was made to Ms De Silva on 1 July 2020 and she returned acceptance to Ms Kapa on 3 July with the signed written individual employment agreement (IEA) dated 2 July 2020.

[12] Ms De Silva and two others were employed at the same time and were trained through the Foundation's induction programme to familiarise themselves in finding how they were going to work and the scope of the business. They received a two-day induction prior to employment commencing.

¹ In closing submissions the Applicant Ms De Silva purported to raise a penalty against the Foundation for breach of a s4of the Act duty of good faith. This claim is not able to proceed because the Foundation has not received fair notice in regards to this part of the claim.

[13] Ms De Silva was working 32 hours a week as stated in her IEA. Her IEA stated she was required to work Monday to Friday, six hours per day between the hours of 9.00 am to 5.00 pm.

Relevant facts

[14] In August 2020 Ms Kapa asked employees to provide IRD numbers to claim the Covid subsidy.

[15] On 14 September Ms Kapa had scheduled to undertake some training. Unfortunately, she became ill and was unable to deliver the training herself as planned. She tried to organise alternative trainers to come from Whangarei to deliver the training on her behalf. In the interim she asked her executive administrative support team (the team) if they could step up and wing it on her behalf while she arrived.

[16] On 14 September Ms De Silva and a co-worker met Ms Kapa at a coffee shop and then went to the hotel where they received the laptop for the training the group. From there they went to the office where the training would be given. When they got there people were already waiting. Ms Kapa opened the office and let them in. After talking to the people, Ms De Silva and a co- worker understood they (the people) had been hired as consultants. Ms De Silva and her assistant both tried to show the consultants the presentation that Ms Kapa had saved on the computer but could not open the presentation. Ms De Silva created a short explanation and a group dynamic exercise to make the time pass but after a few frustrating hours the session was ended without Ms De Silva being able to explain about the company and what they were doing.

[17] After she left that day Ms De Silva received a message from Ms Kapa at 7.05 pm telling her that she had changed the team's work schedule and that they would need to start at 8.30 am for the next day. Ms De Silva had accepted the job in the first instance because the shifts were between 9.00 am and 5.00 pm as she lived in Sandringham and the office was close to the airport. Ms De Silva did not have a car and would have to take three buses to get there. Ms De Silva told Ms Kapa she would not be able to get there by 8.30 am, however made herself available to work from home at any time or arrive at the office at the stipulated time of her contract.

[18] On 15 September, Ms Kapa emailed staff saying that she was changing the weekly schedule. The next day Ms Kapa informed Ms De Silva's that her work hours would be reduced

from 32 hours a week to 20 hours a week. At the same time she increased the hours of another staff member.

[19] On 16 September Ms De Silva emailed Ms Kapa noting the terms of her IEA and stated that she was not agreeing to the proposed changes. She also wrote that any changes needed to be discussed and agreed upon between the parties and after a mutual agreement would need to make any changes in writing to the IEA. Ms De Silva's email confirmed that she would still do her 32 hours per week as per her IEA until they had negotiated a new IEA signed by both parties. On 16 September Ms Kapa replied to the email and reinforced that she would only pay Ms De Silva the 20 hours per week.

[20] On 16 September Ms De Silva contacted the Government Employment Advisory Service and after receiving initial advice decided to seek legal advice.

[21] On 20 September Ms Kapa copied Ms De Silva into an email sent to the Foundation's governance group offering a short term contract to cover her as director as she would be on sick leave. In that email Ms Kapa referred to Ms De Silva and stated "All are due for a performance appraisal in October with an immediate review for Ms De Silva's uncooperative subordinate behaviours which I gave her feedback on last week. She can be managed and observed in my absence."

[22] Ms De Silva was upset by what she believed were derogatory comments about her. On 28 September she went to see a lawyer with another colleague. After talking to her lawyer, she wrote an email to Ms Kapa explaining that she had asked for legal advice about her situation and was trying to resolve the matter in good faith.

[23] On 12 October Ms De Silva, due to the change in her working hours decided to resign. On 14 October Ms De Silva wrote a letter to Ms Kapa saying she was resigning due to the unilateral reduction in work hours and giving her two weeks' notice asking for a final payment with the remaining hours. In her letter Ms De Silva apologised for any inconvenience it may cause the Foundation but stated "I feel I have no other option than to resign and seek employment that pays me enough to survive."

[24] Ms Kapa advised that she should only work two more days and not the entire notice period. Ms De Silva responded telling her that she agreed she only work two more days but

would still be entitled to the missing hours and days from her notice period. She asked that all further communications be handled by her lawyer.

[25] Ms Kapa then sent an email to Ms De Silva's lawyer advising him that Ms De Silva was neither "competent, available and just lazy". She furthermore stated Ms De Silva would not receive any reference from the Foundation as well and made disparaging comments about her work dress.

[26] Ms De Silva gave evidence that she decided not to return to the work environment because she feared for her safety. There was no further contact from Ms Kapa. When Ms De Silva went to the Foundation to return some Foundation property she met two staff in the reception lobby, but when Ms Kapa saw Ms De Silva she asked them to take her downstairs, as she did not want her presence in the office.

[27] Ms De Silva's lawyer then contacted Ms Kapa and through discussions sought a settlement however the parties were unable to resolve their issues. In April 2021 Ms Kapa's lawyer lodged a statement of problem with the Employment Relations Authority.

Discussion

Was Ms De Silva unjustifiably disadvantaged?

[28] An unjustifiable disadvantage personal grievance is set out in s 103(1)(3) of the Act which states that an employee may have a personal grievance with the employee's employment or one or more conditions of their employment have been affected to the employee's disadvantage and by some unjustifiable action by the employer.

[29] The onus will be on the employee to establish that their employment conditions had been affected to their disadvantage. Once established the burden shifts to the employer to demonstrate that under s 103A of the Act their actions were that of a fair and reasonable employer could have done in the circumstances at the time the action occurred.

[30] On 16 September Ms Kapa unilaterally changed the employment hours for Ms De Silva from 32 hours to 20 hours. Ms Kapa accepted Ms De Silva did not consent to her reducing her hours. Ms Kapa described her actions as that of a reasonable employer and that she had to make an executive decision due to her illness and because of the circumstances she needed to delegate someone who was willing and able to take up her delegated role of project manager.

[31] The evidence clearly meets the legal threshold for concluding that the Foundation unjustifiably disadvantaged Ms De Silva in her employment and she suffered material and financial loss as a result of the Foundations actions.

Was Ms De Silva constructively dismissed?

[32] It is well established that an employee may be constructively dismissed by his or her employer when no explicit words of dismissal have been used. The Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* held that constructive dismissal includes, but is not limited to, cases where:

- (a) An employer gives an employee a choice of resigning or being dismissed.
- (b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- (c) A breach of duty by the employer causes an employee to resign.²

[33] Ms De Silva says in this case the third category applies and it was the Foundation's breach of duty when Ms Kapa unilaterally reduced her hours substantially. This is why Ms De Silva left her role at the Foundation.

[34] Because the resignation is forced the technical resignation is in substance a dismissal. So while an employee appears to have terminated the employment relationship by walking out, in a constructive dismissal case the real reason for the termination is the employer's conduct, and its actions are treated as tantamount or equivalent to an actual dismissal. Accordingly, there is no substantive official difference between an employer who, intending to terminate an employment relationship dismisses the employee and one who by conduct, compels an employee to leave the employment.

² *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* [1985] ERNZ.

(i) Did the Foundation breach the terms of the employment agreement causing Ms De Silva to resign?

[35] The Foundation's actions through Ms Kapa's unilateral alteration of the terms of Ms De Silva's contract and reducing the hours of work from 32 hours to 20 hours a week was conduct which was a breach of her employment agreement.

(ii) If so, was Ms De Silva's resignation reasonably foreseeable given the nature of the breaches?

[36] Yes. Ms De Silva put the Foundation on notice that the reduced hours were a serious matter for her which caused her hardship and jeopardised the employment relationship. Her lawyer wrote to the Foundation setting out her concerns. Ms Kapa's behaviour towards her made her fearful of attending work. When the hours were not reinstated Ms De Silva ended the employment relationship.

[37] Ms De Silva's resignation in the circumstances as established was readily foreseeable. She has established that he was unjustifiably constructively dismissed. This was a serious breach.

Issues raised by the Foundation

[38] During the investigation Ms Kapa attempted to rely on performance issues, alleging that Ms De Silva had breached the Foundation's policies and procedures contained in a separate handbook. However, the Foundation failed to appropriately raise allegations of poor performance with Ms De Silva at any stage prior to itself breaching a fundamental term of the employment agreement. It cannot now attempt to rely on such allegations to justify its actions.

Personal grievance

[39] I find Ms De Silva has two personal grievances. One for unjustifiable disadvantage and one of unjustifiable dismissal. As the two personal grievances are intrinsically linked I will take a global approach in considering whether remedies are appropriate.³

³ Employment Relations Act 2000, s123.

Remedies

Compensation for humiliation, loss of dignity and injury to feelings

[40] Ms De Silva said she feels the way she has been treated by the Foundation has had a significant, negative impact on her and has caused her financial hardship. Ms De Silva said her treatment by the Foundation and Ms Kapa's comments were a humiliating experience.

[41] The Authority is satisfied Ms De Silva has experienced harm under each of the heads in section 123(1)(c)(i) and has quantified the harm suffered having regard to the spectrum of harm and quantum of compensation particularly with regard to other awards of compensation. Having regard to the particular circumstances of this case, I consider that an award of \$12,000 under section 123(1)(c)(i) is appropriate.⁴

[42] The Authority is required under s 124 of the Act, where it determines an employee has a personal grievance, to consider the extent to which the employee's actions contributed towards the situation that gave rise to the personal grievance and if the actions require, then reduce remedies that would otherwise have been awarded

[43] Ms De Silva did not contribute in a blameworthy way to the circumstances which led to her employment ending. The Foundation has raised issues about Ms De Silva's conduct which are considered above. Notwithstanding the Authority's findings, even if they were accepted, they are not circumstances which contributed to the circumstances of the personal grievance which arose from the Foundation's failure to pay wages when due and owing in breach of the parties' employment agreement

[44] There are to be no deductions from the remedies awarded for reasons of contribution.

Arrears

[45] Ms De Silva seeks reimbursement of 3 weeks of earnings lost as a result of her dismissal for 27.65 hours in accordance with Ms De Silva's contractual hours of work the value of the outstanding wages is \$1,158.66 gross. These hours are reflective of the outstanding pay owed

⁴ *Wikaira v Chief Executive of the Department of Corrections* [2016] NZEmpC 175 at [237]; *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132 at [66].

to her including their final week of work, and there are no further wages owed to the Employee in respect of their hours of work.⁵

[46] The Foundation is ordered to pay Ms De Silva arrears of wages of \$1,158.66 gross within 21 days of the date of this determination.

(ii) Holiday pay

[47] After the investigation meeting the Foundation presented evidence that Ms De Silva had been paid her final holiday pay of \$1892.63. This over the amount Ms De Silva was claiming. In the circumstances there is no outstanding holiday pay owing.

(iii) Interest

[48] Ms De Silva is entitled to an award of interest on the wage arrears and holiday pay awards. The Authority has the power to award interest under clause 11 of the Second Schedule of the Act. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement.

[49] It is appropriate where a person has been deprived of the use of money to make an award for interest.

[50] Te Rito Foundation Limited is ordered to pay interest on total arrears ordered using the civil debt interest calculator, within 28 days of this determination.⁶

Claim for Penalty

Did Ms Kapa aid and/or abet the Foundation's breaches?

[51] Having found the Foundation has breached statutory duties owed to Ms De Silva I must next consider whether Ms Kapa aided and/or abetted those breaches and whether an award of a penalty (or penalties) is warranted as sought. In considering whether a penalty is warranted and, if so, at what level, regard is had to the factors set out in s 133A of the Act, as well as the

⁵ *Maddigan v Director-General of Conservation* [2019] NZEmpC 190 at [62] and [65].

⁶ www.justice.govt.nz/finances/civil-debt-interest-calculator.

Employment Court decisions in *Nicholson v Ford* and *A Labour Inspector v Daleson Investment Ltd*.⁷

[52] The Foundation's communications with Ms De Silva regarding the unilateral change to hours of paid work were a breach of section 4 of the Act, duty of good faith, because they undermined Ms De Silva's confidence in the employment relationship. Ms De Silva has also sought a penalty against Ms Kapa personally as a person who has aided and abetted in a breach of good faith in the unilateral change to hours of paid work.

[53] However the factual matrix of the good faith breach is the same as the personal grievances for which the remedies have been awarded in Ms De Silva's favour. In the circumstances I decline to exercise my discretion and award a penalty for breach of good faith.

Summary of orders

[54] Ms De Silva was unjustifiably disadvantaged and constructively dismissed, for which remedies have been awarded. Her claims for wage arrears and holiday pay have been upheld. The Authority orders as follows:

a) Within 28 days of the date of determination Te Rito Foundation Limited is ordered to pay Claudette De Silva the following sums:

(i) \$12,000 under s 123(1)(c)(i);

(ii) \$1,158.66 (gross) in wage arrears; and

b) Within 28 days of the date of determination Te Rito Foundation Limited is to calculate and pay Ms De Silva interest on wage arrears, and holiday pay as awarded in paragraphs [49 & 51] above.

Costs

[55] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Ms De Silva may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum the Foundation

⁷ *Nicholson v Ford* [2018] NZEmpC 132 and *Labour Inspector v Daleson Investment Ltd* [2019] NZEmpC 12.

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. If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁸

Andrew Gane
Member of the Employment Relations Authority

⁸ For further information about the factors considered in assessing costs, see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-payingcost.