

**Attention is drawn to the
order prohibiting publication
of certain information
in this determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 396
3121852

BETWEEN	CIARA FITZPATRICK Applicant
AND	KIWI ENGLISH ACADEMY LIMITED First Respondent
AND	KATE HERBERT Second Respondent
	GUY HERBERT Second Respondent

Member of Authority:	Andrew Gane
Representatives:	Gerardus Elwell, counsel for the Applicant Kate and Guy Herbert for the Respondents
Investigation Meeting:	27 April 2022 at Auckland
Submissions and further Information received:	20 May 2022
Date of Determination:	18 August 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The background of this matter is the impact of the Covid-19 pandemic on the Education Sector and in particular Kiwi English Academy Limited's (KEA) business, and staff, specifically Ms Fitzpatrick.

[2] Ms Fitzpatrick brings two broad claims before the Authority.

- (a) Firstly, she says KEA disadvantaged her by unilaterally altering her employment agreement and changing her hours of work.
- (b) Secondly, she says KEA breached s103(A)(2) of the Act in unjustifiably dismissing her by purporting to make her redundant.

[3] Ms Fitzpatrick also seeks penalties for breaches of minimum employment standards imposed against KEA (Wages Protection Act 1983, Holidays Act 2003), and Mr and Mrs Herbert as directors for aiding and abetting any breaches of statutory employment obligations.¹

[4] KEA states that Ms Fitzpatrick agreed to a reduction in her hours of work and that the redundancy was genuine. KEA denies breaching of employment standards. Mr and Mrs Herbert deny aiding and abetting any breaches of statutory employment obligations.

Non-publication order

[5] KEA seeks a non-publication order over financial information it has provided in support of its position. The order is not opposed. I am satisfied it is appropriate to grant the order sought over the subject information given it contains material that is confidential and commercially sensitive to KEA and for which there is no public interest in its publication.

[6] The Authority orders the financial information given in oral evidence at the investigation meeting, provided in the Annual Financial Statements dated 5 May 2022 and financial memorandum dated 20 May 2022, is subject to a non-publication order issued under clause 10(1) of the Second Schedule of the Act.

The Authority's Investigation

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

[8] At a case management conference on 21 December 2021, the Authority set the matter down for an investigation meeting from 27 to 28 April 2022 and set directions for the lodging and service of evidence. An interim non-publication order in respect of financial statements concerning KEA's financial position was granted and recorded in the minutes.

¹ Employment Relations Act 2000, s 134(2).

[9] Ms Fitzpatrick's counsel filed an amended statement of problem including an application to join Mr and Mrs Herbert (KEA's directors) as respondents dated 17 January 2022.

[10] KEA's representatives, Mr and Mrs Herbert filed an amended statement of reply dated 8 February 2022 opposing the application for joinder of the directors of KEA as respondents and including an application to join Ms Fitzpatrick's legal representative.

[11] A second case management conference was convened on 29 March 2022 to address the amended statement of problem and amended statement of reply. At the case management conference, the Authority granted the application to join the directors as respondents and KEA's application to join the legal representative as a party was declined as recorded in the minutes dated 29 March 2022.

[12] The parties attended an investigation meeting on 27 April 2022. Ms Fitzpatrick and supporting witnesses gave evidence for the applicant. Mr and Mrs Herbert and supporting witnesses gave evidence for the respondent. At the close of the hearing a timetable was set with the agreement of the parties to file written submissions.

[13] 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 of the material before it, including all the evidence by the parties and their submissions.

Issues

[14] The issues for resolution were:

- (a) Was Ms Fitzpatrick unjustifiably disadvantaged by KEA's decision to amend her working hours?
- (b) Was Ms Fitzpatrick unjustifiably dismissed?
- (c) Was KEA's decision to dismiss Ms Fitzpatrick on the grounds of redundancy and how that decision was made, what a fair and reasonable employer would have done in all the circumstances at the time, including consideration of:

- (i) whether those decisions were predominantly motivated by genuine business reasons; and
 - (ii) whether Ms Fitzpatrick was fairly consulted about the process for change and her feedback fairly considered; and
 - (iii) whether alternatives to redundancy and for redeployment to other positions were fairly considered.
- (d) If KEA's actions were found to have unjustifiably disadvantaged and/or dismissed Ms Fitzpatrick, what remedies should be awarded considering:
- (i) lost wages (subject to evidence of reasonable endeavours to mitigate this loss); and
 - (ii) interest awarded on any lost wages: and
 - (iii) compensation under s 123(1)(c)(i) of the Act.
- (e) If any remedies are awarded, should they be reduced (under s 124 of the Act) for any blameworthy conduct by Ms Fitzpatrick that contributed to the situation giving rise to her grievance?
- (f) Did actions by KEA breach s75 of the Holidays Act 2003 and if so, should a penalty be imposed?
- (g) Did actions by KEA breach s13 of the Wages Protection Act 1983 and if so, should a penalty be imposed?
- (h) Did the directors aid and abet any breaches of any statutory employment obligations. and if so, should a penalty be imposed under 134 of the Act?
- (i) Should either party contribute to the cost of representation of the other party?

Relevant Law

Test for Justification

[15] Under s103(1)(b) of the Act may bring a personal grievance claim against an employer if their employment condition(s) have been disadvantaged by the employers' actions. In a claim for unjustified disadvantage the employee needs to establish that their employment condition(s) have been affected to their disadvantage. It is then for the employer to prove there were good reasons for the employee's condition(s) of employment being affected, and that it

was carried out in a manner that was procedurally fair way. The test under s103A of the Act “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 ...action occurred.”²

[16] In a claim for unjustified dismissal the Authority does not substitute its own judgment for that of the employer when called on to assess decisions by an employer that a position has become superfluous to its business needs and that the worker holding the position had to be dismissed because there were no suitable alternative roles for that person in the business.

[17] Where questions are raised about the commercial viability of an employer’s decision or ulterior motives are alleged for the selection of a person or a worker for redundancy, the Authority must consider whether the employer’s decisions were made for genuine business reasons.

[18] The Authority must consider whether the employer’s process for making and carrying out decisions was fairly conducted.

Fairness

[19] Fairness includes meeting the statutory good faith obligations placed on an employer proposing to make likely decisions that may adversely affect an employee’s conditions of employment or have an adverse effect of the continuation of a person’s employment.

[20] Workers likely to be affected should have access to information relevant to the continuation of their employment and an opportunity to comment on it before the decision is made. How much must be done to meet those obligations of fairness and good faith will vary to some degree with regard to resources available to the particular employee.³

Background

[21] Ms Fitzpatrick commenced employment as a reliever teacher on a casual basis with KEA from 4 December 2018. Ms Fitzpatrick signed a full time permanent individual employment agreement (IEA) dated 11 March 2019, with work commencing on 13 March 2019. Her working hours were set out in her IEA providing 25 contact teaching hours and 12.5

² Employment Relations Act 2000, s 103A(2)

³ Employment Relations Act 2000, s 4(1A) and s 103A(3)-(5).

hours preparation, making a total of 37.5 working hours per week. Her salary was based on non-contact and contact hours. KEA operated the High School Preparation Unit (HSPU) with one full time equivalent position (FTE) shared between two teachers, of which one was Ms Fitzpatrick. Ms Fitzpatrick discharged half of her teaching students at HSPU and the other half at the main KEA campus in Newmarket. Ms Fitzpatrick's generic IEA does not specify which campus she would work from.

[22] Ms Fitzpatrick was the more senior teacher at the HSPU as she had held this position for eight months. The position was viewed by KEA at the time as more secure because of the contractual agreement KEA had with school where the HSPU operated. The contract had been in existence for 10 years.

[23] After going into lockdown and moving to the online teaching platform, Ms Fitzpatrick and the other teacher agreed Ms Fitzpatrick would be the sole full-time teacher teaching at the HSPU while the other teacher worked out of the KEA precinct. This was formally approved by the KEA principal as Ms Fitzpatrick had the best understanding of the school's online teaching platform which was substantially different from the KEA pedagogy. The decision was also influenced by the fact that she had worked there longer of the two teachers and had been nominated by KEA as the teacher in charge of communications between the school and KEA at a technical level. In addition to her normal salary, Ms Fitzpatrick was paid an extra \$1,250 per annum for this responsibility.

Ms Fitzpatrick's hours are reduced

[24] Ms Herbert gave evidence at the investigation meeting that every staff member including Ms Fitzpatrick was consulted in regard to the effect the boarder closure would have on the operation of KEA in April 2020 both as a group and individually. This consultation was conducted by audio video link because of the Level 3 status of the Covid-19 lockdown. A subsequent decision was made, and the restructuring proposal 15 May 2020 communicated individually to each staff member including Ms Fitzpatrick by audio video link. Ms Fitzpatrick was informed by the KEA that her paid working hours had been reduced to 18 hours a week at the HSPU.

Ms Fitzpatrick is made redundant

[25] On 25 May Mrs Herbert the KEA Principal discussed with Ms Fitzpatrick the advice from the school that the HSPU would be suspended from the end of term two i.e., 3 July 2020.

During the discussion Ms Fitzpatrick was advised no positions in the organisation were available to be offered to her at that time. Ms Fitzpatrick was advised that because of her loss of position in HSPU, she would be made redundant with her last working day being 3 July 2020. Ms Fitzpatrick's IEA does not specify her place of work, rather it states the place of work is "all existing and future of offices of the company."

[26] She was also advised during the discussion KEA would continue to look for work for her if possible. This was confirmed by formal letter dated 28 May 2020 advising her she was to be made redundant and her last working day being 3 July 2020. On 2 July 2020, an additional five weeks of work was offered to Ms Fitzpatrick which she accepted. Then on 4 August a further six weeks at KEA were offered of which she accepted two.

Discussion

Was Ms Fitzpatrick unjustifiably disadvantaged by KEA's decision to reduce her working hours?

[27] 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 if 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.

[28] The employee needs to establish that their employment conditions had been affected to their disadvantage. The employer then needs 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.

[29] Ms Herbert alleged Ms Fitzpatrick agreed to the reduction of hours of work as her contribution to assisting the school with the effect of Covid-19 and border closure. Ms Fitzpatrick denied consenting to the reduction in hours and there was no subsequent written variation to her IEA, and I accept Ms Fitzpatrick's evidence on this issue.

[30] The failure by KEA to obtain Ms Fitzpatrick's consent before unilaterally reducing her hours of work and subsequently her pay was an unjustified action and Ms Fitzpatrick has established her personal grievance for unjustified disadvantage on those grounds.

[31] Ms Fitzpatrick is a foreign national on a working visa and was not entitled to any government benefit or financial support in New Zealand. From 10 March to 30 June 2020 Ms Fitzgerald was under paid \$5,002.94 in wages due to KEA unilaterally changing her contractual employment hours⁴. Ms Fitzpatrick said that her health and wellbeing suffered as a direct result of the KEA's actions towards her.

[32] The evidence clearly meets the legal threshold for concluding that KEA unjustifiably disadvantaged Ms Fitzpatrick in her employment and she suffered material and financial loss as a result of KEA's actions.⁵

Was Ms Fitzpatrick unjustifiably dismissed?

[33] When considering whether such decisions were justified, the Authority must determine whether the employer's actions, and how the employer acted, met the objective statutory standard being what a fair and reasonable employer could have done in all the circumstances at the time.⁶

(i) *Whether KEA's decision to dismiss Ms Fitzpatrick on the grounds of redundancy were predominantly motivated by genuine business reasons?*

[34] Both Mr and Mrs Herbert gave evidence as to the loss of revenue for the business and the possibility of KEA's closure. Given the well documented devastating impact COVID 19 had on English language schools and the loss of revenue due to the closing of the borders to international students, there were genuine business reasons for KEA's proposed restructure.

(ii) *Whether Ms Fitzpatrick was fairly consulted about the process for change and her feedback fairly considered?*

[35] There was some limited consultation with staff including Ms Fitzpatrick on the effect economic consequences for KEA. However, Ms Fitzpatrick was not adequately consulted on the impact of the closure of the HSPU would have on her role. She was merely told that due to the closure of the HSPU there was no longer a role for her.

⁴ Applicants closing submissions tabled and pay records provided by respondent.

⁵ *Grant v Super Strike Bowling Centres Ltd* [1992] 1 ERNZ 727.

⁶ Employment Relations Act 2000, s 103A.

(iii) *whether alternatives to redundancy and for redeployment to other positions were fairly considered?*

[36] KEA submitted that the school's decision to terminate the HSPU effective from 23 July 2020 disestablished KEA's HSPU teaching position. Therefore, KEA believed it was appropriate to elect to make Ms Fitzgerald redundant.

[37] On Monday 25 May 2020 Ms Herbert informed Ms Fitzgerald she would be made redundant, effective on 3 July 2020. Ms Fitzgerald was not consulted on the selection process prior to being made redundant.

[38] Before the lockdown there was one FTE position shared between two KEA English language teachers in the HSPU, one of which was Ms Fitzpatrick. Ms Fitzpatrick discharged half of her teaching students at HSPU and the other half at the main KEA campus in Newmarket.

[39] KEA agreed to an arrangement that Ms Fitzpatrick would be the sole fulltime teacher at the HSPU while the other teacher worked out of the KEA precinct. Both teachers were English language teachers and KEA's employees. As a result of the closing of the HSPU, KEA's two English language teacher positions were reduced to one English language teacher position.

[40] As an employee Ms Fitzpatrick had an expectation that in good faith KEA would undertake a reasonable restructuring process, including a fair and transparent selection process. She could also expect that she would be consulted on the process, possible redeployment in the main campus and any proposal to make her redundant. This did not occur and in the circumstances no genuine consultation took place with Ms Fitzpatrick.⁷

[41] It is possible that even if KEA had carried out a fair restructuring process Ms Fitzpatrick may have still been made redundant, however no such process was carried out.

[42] KEA's failure to complete a fair process and consider the possible redeployment to another position was not what a fair and reasonable employer could have done in the

⁷ *Grace Team Accounting Ltd v Brake* [2014] NZCA 541.

circumstances. Those were unjustified actions and Ms Fitzpatrick has established her personal grievance for unjustified dismissal on those grounds.

[43] These were more than procedural flaws. They went to the substance of the decision to dismiss Ms Fitzpatrick. She did not have a fair opportunity to address the process before that conclusion was reached.

Issues raised by KEA

[44] During the investigation KEA attempted to rely on Ms Fitzpatrick's alleged performance issues. KEA failed to appropriately raise and address these allegations with Ms Fitzpatrick at any stage prior to dismissing her. It cannot now attempt to rely on such allegations to justify its actions in making her redundant.

Remedies

Wage Arrears

[45] As set out above in paragraph [21] Ms Fitzpatrick's IEA provides she will be paid every week for 37.5 hours. An examination of the pay records provided by KEA show as a result of the reduction of hours Ms Fitzpatrick was under paid \$5,002.94.

[46] KEA is ordered to pay to Ms Fitzpatrick wage arrears of \$5,002.94 within 28 days of the date of this determination.

Interest

[47] Ms Fitzpatrick can recover interest on the arrears and KEA is liable for payment of that interest calculated from date of the reduction of hours being 15 May 2020, until the arrears are paid in full. KEA is ordered to calculate and pay interest on total arrears ordered, using the civil debt calculator on the Ministry of Justice website within 28 days of the date of this determination.⁸

Personal Grievances

[48] I find Ms Fitzpatrick has two personal grievances. One for unjustifiable disadvantage and one of unjustifiable dismissal. As the two personal grievances stem from the same factual

⁸ <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>

matrix and course of conduct and Ms Fitzpatrick gave evidence as to the combined effect the conduct had on her wellbeing, I will take a global approach in considering whether remedies are appropriate.

Compensation for humiliation, loss of dignity and injury to feelings

[49] Ms Fitzpatrick gave evidence about the effects on her of KEA's reduction of work hours, the decision to dismiss her for redundancy and how it had gone about making that decision. She stated the reduction of work hours caused her significant stress for which she sought medical assistance. She said she found it hard to get over how she had been treated and it had damaged her confidence and was a significant factor in her decision to return to Ireland. It has also affected her confidence when applying for roles.

[50] An appropriate award to compensate for the effects on her, accepting her evidence, was \$12,000. KEA is ordered to pay to Ms Fitzpatrick compensation of \$12,000 within 28 days of the date of this determination.

Reduction of remedies for contributory conduct

[51] The Authority is required, when deciding on the nature and extent of remedies awarded for a personal grievance, to consider the extent that Ms Fitzpatrick's actions contributed to the situation giving rise to her personal grievances and, if those actions require, reduce the remedies accordingly.⁹

[52] Ms Fitzpatrick did not contribute in a blameworthy way to the circumstances which led to her working hours and pay being reduced or employment ending. KEA has raised issues about Ms Fitzpatrick'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 grievances which arose from KEA's reduction of her work hours and dismissal.

⁹ Employment Relations Act 2000, s 124.

No penalty in relation KEA's breaches of the Holidays Act 2003, Wages Protection Act 1983 and in relation to Mr and Mrs Herbert aiding and abetting KEA's breaches of employment standards.

[53] The application for penalties is statutorily barred as they were not raised until the lodging of the amended statement of problem with the Authority on 17 January 2022, outside the 12 month time limit.¹⁰

Summary of orders

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

a) Within 28 days of the date of determination Kiwi English Academy Limited is ordered to pay Ms Ciara Fitzpatrick the following sums:

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

(ii) \$5,002.94 (gross) in wage arrears.

b) Within 28 days of the date of determination Kiwi English Academy Limited is to calculate and pay Ms Ciara Fitzpatrick interest on wage arrears as awarded in paragraph [47] 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 Fitzpatrick 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 KEA would then have 14 days to lodge any reply to memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

¹⁰ Employment Relations Act 2000, s 135(5), Wages protection Act 1983, s13(1), Holidays Act 2003, s75.

[56] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless circumstances or factors required an upward or downward adjustment of that tariff.¹¹

Andrew Gane

Member of the Employment Relations Authority

¹¹ For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-payingcost