

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 561
3139781

BETWEEN KRISTYNA HAVELKOVA
Applicant

AND YOUTH HOSTELS ASSOCIATION OF
NEW ZEALAND INCORPORATED
Respondent

Member of Authority: David G Beck

Representatives: Keegan Iraia and Lee Johns, advocates for the Applicant
Penny Shaw, counsel for the Respondent

Investigation Meeting: 13-14 September 2022 in Timaru

Submissions Received: 14 September 2022 from the Applicant
14 September 2022 from the Respondent

Date of Determination: 1 November 2022

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] Ms Havelkova who is from the Czech Republic, was employed by Youth Hostels Association of New Zealand Inc (YHA) as a chef in their Tekapo café and bar from 17 April 2019 until she resigned on 31 August 2020.

[2] Ms Havelkova claims that YHA unjustifiably dismissed her during a restructuring process. In an alternative claim, Ms Havelkova contends that actions of YHA during the

restructuring process disadvantaged her. It is claimed that the YHA has not acted in a manner consistent with good faith obligations, including truncating consultation and after disestablishing her position, it failed to provide an alternative redeployment opportunity in a timely fashion.

[3] As remedies, Ms Havelkova claims compensation for distress and lost wages.

[4] By contrast, YHA contend that the restructuring undertaken was initiated for genuine business reasons and it was based upon Ms Havelkova's position being initially superfluous to the YHA's needs, exacerbated by a drop off in business and financial difficulties resulting from Covid restrictions impacting upon international visitor numbers. YHA say that after assisting Ms Havelkova with immigration issues, they concluded genuine consultation and considered feedback before deciding to disestablish Ms Havelkova's role but then had to adjust the scope of their restructuring. YHA say they subsequently as soon as practicable, offered Ms Havelkova ongoing employment but she voluntarily chose to resign.

The Authority's Investigation

[5] The investigation took one and a half days and I considered helpful written and oral evidence from: Kristyna Havelkova, her partner and advocate, Keegan Iraia and Lee Johns, co- advocate (Keegan's mother). I also heard evidence from ex YHA employees: Wenting Zhang, then Chef Manager at Tekapo YHA café (by Zoom), Simon Cartwright then General Manager, Hostel Operations, William Kerr, then Tekapo Hostel Manager and Kate Ufton, then Human Resources Advisor.

[6] I received submissions from both parties' representatives and additional information during the investigation meeting. I have carefully considered the information provided and submissions. As permitted by s 174E of the Act I have not set out a full record of every event or matter of dispute between the parties. This determination is confined to making findings of fact and law necessary to dispose of Ms Havelkova's claims.

Issues

[7] The issues the Authority must resolve are:

- i. Was Ms Havelkova unjustifiably dismissed?
- ii. Did the YHA engage in any actions or omissions that caused Mr Havelkova to be unjustifiably disadvantaged including failing to provide sufficient time for feedback from Ms Havelkova on a restructuring proposal?
- iii. Did the YHA breach any good faith obligations?
- iv. If an unjustified dismissal or disadvantage claim is established, what if any remedies should be awarded?
- v. If Ms Havelkova is successful in all or any element of her claims should the Authority reduce any remedies due to contributory conduct?
- vi. How costs should be dealt with.

What caused the employment relationship problem?

[8] The YHA initially engaged Ms Havelkova pursuant to an individual employment agreement on a fixed term basis, as a Chef at Tekapo from 17 April 2019 to 26 January 2020. At the time, Ms Havelkova was in New Zealand on a temporary holiday work visa. Once Ms Havelkova gained an essential work visa (tied to employment with YHA) and progressed in her job, YHA upgraded her role and remuneration to a permanent Demi-Chef position from 24 December 2019 pursuant to a new individual employment agreement. Ms Havelkova then was able to uprate her work visa to “low skilled essential” status on 23 January 2020 for an initial period of 12 months (expiring on 21 January 2021). No performance issues arose during 2019/2020 with YHA acknowledging that Ms Havelkova performed exceptionally in her role. During this period Ms Havelkova formed an ongoing personal relationship with a co-worker, Mr Iraia, and they shared YHA private accommodation at Tekapo.

[9] In late February 2020, taking an approved period of paid/unpaid annual leave, Ms Havelkova returned to the Czech Republic to visit family. Unfortunately, Ms Havelkova's leave coincided with the government's first COVID-19 lockdown period commencing (25 March) and accompanying international border entry restrictions. This resulted in Ms Havelkova being initially unable to return to New Zealand on her due return date of 30 April. The YHA was in receipt of an initial 12-week wage subsidy from the New Zealand government up to 23 June 2020.

[10] The impact of halting international tourism upon YHA's business was immediate and significantly ongoing. The Tekapo Café and bar closed during lockdown restrictions and then was impacted by ongoing border restrictions. YHA indicated up to 80% of its then business was reliant on international visitors and they suffered a huge revenue decline. This led to a need to restructure and reduce staffing overheads that was first communicated in general terms to Ms Havelkova and affected YHA workers, by email of 24 April 2020 from the YHA's Chief Executive. An email of 5 May provided further contextual detail, an outline of the restructure and indicative dates for key decisions. Further, on 13 May a letter to Ms Havelkova indicated her position and eleven others at Tekapo were potentially impacted and feedback was sought by 20 May 2020.

[11] During the investigation meeting Ms Havelkova and her advocates affirmed they did not contest the genuineness of the reasoning behind YHA's need to restructure. As an indication of the dire situation the YHA was in, all eleven hostels they managed subsequently closed on 15 December 2021 including Tekapo, that also led to the permanent closure of the YHA Tekapo café.

[12] Mr Kerr, Tekapo's hostel manager on 14 May, emailed Ms Havelkova and attempted to set up a Zoom meeting to discuss the restructuring and answer any queries she had. After initially agreeing to the call, Ms Havelkova postponed it, saying she needed to obtain legal advice about how the proposal would impact upon her immigration status and ability to return

to New Zealand (at the time, Ms Havelkova had had an application to return to New Zealand turned down by Immigration NZ on 23 April).

[13] In the meantime, Mr Iraia had asked Mr Kerr to brief YHA management that Ms Havelkova was outside New Zealand and her ability to gain re-entry was at issue, which he did on 19 May (informing Mr Cartwright). Mr Iraia also called Mr Cartwright on 20 May recording the call and produced an agreed transcript during the investigation meeting. The call's key points were:

- Mr Iraia informed that Ms Havelkova had now obtained a border exemption to return to New Zealand “on humanitarian grounds”.
- That they would ‘ultimately’ be pursuing a partnership visa and on this basis, Mr Iraia asked if YHA could “hold off on the current proposal” to which Mr Cartwright responded “Yip, ok” after clarifying a delay in the restructuring was being sought by them both.
- However, as the conversation proceeded, Mr Cartwright emphatically clarified his earlier assurance by stating:

All I can say is I will undertake, liaise with you personally before any decision is made, that is the only guarantee I can give you at this stage.¹

[14] Ms Havelkova and Mr Iraia did not provide feedback on the restructuring proposal by the due date (20 May).

[15] Mr Iraia further contacted Mr Cartwright on 22 May, to express concern about a potential inability of Ms Havelkova to re-enter New Zealand if her position was disestablished whilst she was in the Czech Republic. Mr Cartwright whilst indicating he needed Ms Havelkova's assent to discuss her personal situation, resolved to assist Ms Havelkova's return by delaying the communication of the decision to disestablish her role and YHA did not make any issue of Ms Havelkova's additional one month, period of absence from work. YHA evidence was they understood the request for delay was solely to allow Ms Havelkova to sort

¹ Agreed transcript of telephone call between Keegan Iraia and Simon Cartwright, 20 May 2020.

her immigration status to return to New Zealand rather than a request for more time to provide feedback on the actual restructuring proposal. In the all the circumstances, I find that assessment to be accurate.

[16] With assistance from an immigration lawyer, Ms Havelkova had managed to make out an exemption for re-entry on humanitarian grounds and was able to return to New Zealand on 26 May, initially subject to quarantine in Auckland (up to 9 June). Mr Cartwright says upon hearing of Ms Havelkova's safe return on 27 May he issued by email, the previously withheld decision to disestablish Ms Havelkova's position of Demi-Chef at Tekapo. This letter dated 26 May, thanked all impacted workers for their submissions on the proposed changes and then indicated Ms Havelkova's position of Demi-Chef "will be disestablished with an effective date of 23 June 2020" and then he indicated as no redeployment options were available, the redundancy provisions of Ms Havelkova's employment agreement would prevail.

LWOP option

[17] YHA also offered an alternative to redundancy of a six months' period of leave without pay (LWOP) with preferential appointment to any Demi-Chef vacancy that may arise during this period. At the end of six months an option of redundancy payment or further unspecified leave duration was offered. This 'alternative option' also suggested before acceptance that any accrued leave would have to be utilised. The letter concluded by specifying that if no application for leave without pay was pursued, employment would end on 23 June 2020 and redundancy compensation would be paid out. In addition, YHA said they would extend provided accommodation up to 7 July and offered EAP counselling support.

[18] At the same time (end of May) on legal advice, Ms Havelkova decided to pursue a partnership visa to extend her stay in New Zealand due to the uncertainty of her future work visa and the impact of losing her role with the YHA. Ms Havelkova understandably, described that she experienced significant distress at the uncertainty this situation created,

exacerbated by her being alone whilst in quarantine. Ms Havelkova also incurred significant legal and additional travel expenses.

[19] After being apprised of Ms Havelkova's then dilemma of seeking to re-enter New Zealand, Ms Ufton tried unsuccessfully to get clarity on the impact of the LWOP option on Ms Havelkova's ongoing visa status.

10 June 2020 meeting

[20] On 10 June, Mr Cartwright and Ms Ufton met Ms Havelkova and Mr Iraia in Christchurch. This pre-arranged meeting was complicated by Mr Iraia using it to address some personal employment issues before addressing Ms Havelkova's matters of concern – these were that Ms Havelkova:

- believed inadequate time had been afforded her to make a choice on the restructuring options;
- was confused by the legal situation of the impact of LWOP on her ongoing work visa and that it was YHA's responsibility to clarify this;
- considered that during the lockdown (despite being on agreed leave) she should have received the full wage subsidy.

[21] At the conclusion of the meeting, Ms Ufton agreed to share information they could obtain on the impact of LWOP or redundancy on Mr Havelkova's visa status and then suggested in the absence of any submission from Ms Havelkova and Mr Iraia, that they come back to Mr Cartwright with any alternative suggestions the YHA could consider. Following the meeting Ms Ufton emailed Ms Havelkova the YHA's lawyer's webpage, outlining a general view that LWOP may be an option for employers to retain migrant workers.

[22] On the latter, I observe that Ms Havelkova was already getting her own specialist legal advice and direction and that YHA did all they could in the circumstances to support her re-entry by delaying the communication of her job being disestablished – I could not discern

anything more the YHA could have done. I do not find that they misled Ms Havelkova by the provision of information they accessed suggesting the LWOP option may not impact negatively. In the event, Ms Havelkova went with her lawyer's more conservative advice that the LWOP option or taking redundancy may prove problematic and an application for a partnership visa was essentially a 'safer bet' in uncertain times. I also observe that given that Ms Havelkova had formed an ongoing relationship with Mr Iraia and expressed a desire to continue to reside in New Zealand, this option was a logical one.

[23] I do not find it was the responsibility of YHA to provide specialist legal advice to its employees on immigration matters. Ms Havelkova made a choice to obtain her own legal advice and follow such. That was her choice. YHA were caught up in extraordinary circumstances and whilst many of their employees were migrant workers, their legal status and ability to remain in or return to New Zealand was the subject of government policy outside of YHA's control or influence.

[24] Further, although raising a concern about a lack of fuller consultation, Ms Havelkova did not identify any alternative proposals to YHA and it is difficult to speculate on what more they could have done to assist Ms Havelkova's central and understandable concern, that she be able to remain in New Zealand.

[25] On the wage subsidy issue, YHA compromised and paid it to Ms Havelkova from 1 May onwards despite arguably, having no legal obligation to do so (as Ms Havelkova was overseas on pre-arranged annual leave during the lockdown and arguably not available for work).

Aftermath

[26] After the 10 June meeting, as disclosed in email correspondence between Mr Iraia and Ms Havelkova's immigration lawyer of 12 June, the pair indicated that Ms Havelkova:

- wished to pursue the option of a partnership visa;

- was considering a redundancy payment as best option to end employment with YHA;
- would be spending more time at Mr Iraia's mother's house in Timaru on their days off work;
- wanted to know if Ms Havelkova took the redundancy option could her visa be varied to allow her to work for another employer "in Timaru".

Return to work

[27] Ms Havelkova returned to work on 12 June 2020 and Ms Ufton emailed both Ms Havelkova and Mr Iraia asking for what if any matters they wished YHA to follow up from the 10 June meeting regarding the disestablishment of her role. By email of 15 June, Ms Havelkova sought further clarification on the impact of LWOP on her work visa so she could make an informed decision on the choices available and disclosed her lawyer's view that if she opted for LWOP she risked deportation as her visa required her to be in paid employment. Ms Havelkova also informed Ms Ufton that with Mr Iraia she was working on getting "our partnership application submitted". A concern about residual wage subsidy issues was also raised.

[28] Ms Ufton responded agreeing to address the wage subsidy issue and that YHA still had no clear picture of the impact of LWOP on migrant work visas. Ms Ufton suggested "a Zoom meeting to discuss the issues you have raised?".

Changed circumstances

[29] By mid-June 2020, YHA predicted that domestic tourism was greatly expanding and anticipated a need to adjust short term expectations upwards during the ski season and school term breaks. This resulted in Ms Havelkova being offered and accepting a deferment of the disestablishment of her role until 31 August 2020. Ms Havelkova signed a letter of offer dated 21 June 2020 on 25 June, confirming a "Deferred Disestablishment Date" that indicated

that if accepted her employment would end on 31 August and “the redundancy provisions in your employment agreement will apply”. By this point in time, in a letter of 23 June, Ms Havelkova’s lawyer had submitted a letter to Immigration NZ in support of a partnership visa application (Mr Kerr also provided a letter of support from the YHA).

[30] Mr Iraia resigned from his employment by letter of 4 August 2020 (with effect from 4 September) to move to Timaru and pursue work there and tertiary study.

[31] The next complication for Ms Havelkova, was in early August when YHA resolved that two Demi Chef roles at Tekapo could now be retained. This, as unfortunate timing, was communicated to Ms Havelkova on 4 August at a meeting with Mr Kirk and Ms Zhang. Initially Ms Havelkova indicated that she and Mr Iraia had found a house to move to Timaru and still planned to resign on 31 August (commuting being impractical) but Mr Kerr asked her to contemplate the offer of ongoing employment. The occupant of the other Demi-Chef position got the same offer but declined it.

[32] On 10 August, Ms Havelkova emailed Mr Kerr confirming her last day would be 31 August. Mr Kerr responded the same day (referring to the 4 August discussion) checking that Ms Havelkova fully understood that the YHA had resolved due to increased and anticipated business to retain her position and it was no longer disestablished. Mr Kerr invited Ms Havelkova to meet him “if this was not your understanding so we can have a discussion” or re-confirm 31 August would be her last day of employment. Mr Kerr also sent a reminder email to Ms Havelkova on 27 August, as she did not respond to his 10 August email restating her job was ongoing if she wished to take it. Ms Havelkova did not respond further and at this point in time, she authorised Ms Johns (Mr Iraia’s Mother) to advocate on her behalf on 11 August.

Personal grievance

[33] Ms Johns sought and received background information from the YHA that led to her generally identify on 20 August, concerns that YHA had failed to follow appropriate

processes and not provided Ms Havelkova with sufficiently accurate information to make choices on the disestablishment options. YHA responded on 21 August offering to meet so Ms Johns could expand on the concerns. Ms Johns did not immediately follow this up. I observe by this point in time, YHA had effectively withdrawn the notice of disestablishing Ms Havelkova's role.

[34] Ms Havelkova resigned on 31 August 2020 and was paid out redundancy compensation on 8 September, despite YHA having no contractual obligation to do so, as Ms Havelkova had turned down an offer of ongoing employment in the same role.

Assessment

[35] Whilst acknowledging the very difficult contextual circumstances and understandable distress such as caused Ms Havelkova, I find that the YHA has not acted in an unreasonable manner. They assisted Ms Havelkova's return by delaying communicating the restructuring decision to disestablish her role, met with her and offered to consider any further feedback but none was provided. The decision and timing of extending Ms Havelkova's employment was not wholly within YHA's control due to the rapidly changing and uncertain external environment.

[36] I have carefully examined whether it was unreasonable to conclude the initial disestablishment of Ms Havelkova's role whilst she was in the Czech Republic but find that this was not so. Ms Havelkova had ample opportunity to provide feedback and given she accepted the genuineness (at the time) of the proposal, I can see little would have been gained by extending the consultation period. Further, at the 10 June meeting YHA rectified any perceived shortcoming in process by making an open offer they would consider any proposal Ms Havelkova put forward – none was forthcoming.

[37] The LWOP option was innovative and evidently driven by a concern for the migrant workers' plight as well as keeping staffing recruitment options open for YHA. During the Covid border closure period, Ms Havelkova was in an uncertain position that many migrant

work visa holders also experienced. This was exacerbated by Ms Havelkova's unique personal circumstances that were causative of additional distress but YHA cannot be said to have caused any additional distress.

[38] I have found it was not YHA's responsibility to provide an individual immigration solution with such being outside their sphere of influence and Ms Havelkova sensibly engaged her own legal specialist who gained her a successful return to New Zealand and proffered sound advice on her work visa.

[39] I find Ms Havelkova, supported by Mr Iraia, had ample time to provide feedback on the initial restructuring proposal and a further delay in implementing such to cater for Ms Havelkova being outside New Zealand was impractical. I find that any delay in communicating the decision to disestablish Ms Havelkova's role would not have afforded her any other options. Ms Havelkova could still have chosen the LWOP option whilst pursuing her partnership visa. Ms Havelkova suggested an extension of time would have allowed the YHA to consider changing their proposal. I find this suggestion to be mere 'wishful thinking' as no other options existed with YHA equity wise, also having to balance up the needs of other impacted workers.

[40] What was clear, was Ms Havelkova's decision to move to Timaru was evidently influenced by Mr Iraia's decision to quit his job at Tekapo and move to Timaru with it being impractical for Ms Havelkova to commute. The timing of the ongoing work offer in early August 2020 was unfortunate but I could detect no malice from YHA on such and every wish to retain Ms Havelkova. Ms Havelkova was afforded a period to reflect upon her decision to opt for redundancy and chose not to engage further and to work out her notice period.

[41] I observe that Ms Havelkova and Mr Iraia coincidentally chose to make an alternative plan to move to Timaru and pursue a partnership visa. That was their choice that although somewhat dictated by circumstances, I do not attribute any fault on to the YHA.

Finding

[42] As such, I find that Ms Havelkova has not made out her personal grievances and no remedies are appropriate.

Outcome

[43] Overall, I have found that the circumstances of Kristyna Havelkova's employment ending did not amount to an unjustified dismissal or an unjustified disadvantage.

Costs

[44] Costs are at the discretion of the Authority and are reserved. The parties are encouraged to make an agreement on costs. If no agreement is achieved, the Youth Hostels Association of New Zealand Incorporated has fourteen days following the date of this determination, to make a written submission on costs and Kristyna Havelkova has a further fourteen days to provide a response. I will then determine what costs are appropriate.²

David G Beck
Member of the Employment Relations Authority

² For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1