

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 328
3192059

BETWEEN ALI'ITASI LUAMANUVAE-SU'A
Applicant

AND THE PORT HILLS FOUNDATION
CHARITABLE TRUST
Respondent

Member of Authority: Antoinette Baker
Representatives: Paul Brown, counsel for the Applicant
No appearance for the Respondent
Investigation Meeting: 7 June 2023 at Christchurch
Submissions Received: On the day from the Applicant
Date of Determination: 22 June 2023

DETERMINATION OF THE AUTHORITY

[1] Ms Luamanuvae-Su'a (Ali'itasi) was employed by the respondent (PHT), a registered charitable trust whose chief executive, and co-trustee (with four others) is Ms Leta Tuaoi Quartermain. The registered trust deed records Ms Quartermain as settlor of the trust.¹ Ali'itasi started work on 15 November 2021. On 23 December 2021 Ms Quartermain gave Ali'itasi a termination of employment letter giving the reason as redundancy, effective immediately.

[2] Ali'itasi says that she was given no prior notice of this immediate termination and that PHT unjustly dismissed her both procedurally and substantively. She claims an unpaid four

¹ The Port Hills Foundation Charitable Trust is registered as a Charitable Trust and has a Trust Board number of 50046260: www.companiesoffice.govt.nz/charitable-trusts

week notice period, the balance of unpaid public holiday entitlements that fell during the four week notice period, compensation, lost earnings beyond termination and costs.

[3] PHT appears to say variously that the reason for the termination was that it was a redundancy after consultation about what would happen in the Christmas/New Year break when Ms Quartermain did not require Ali'itasi to assist her; or that Ali'itasi was employed under a 90-day trial period and notice was unnecessary; or that Ali'itasi agreed not to work across the Christmas/New Year break and would have the opportunity to return to employment after this in January or February 2022.

The Authority's investigation

[4] I investigated this employment relationship problem by holding an initial phone conference call after which I timetabled for evidence to be submitted and a meeting to be held. Ms Quartermain and Ali'itasi's representative joined that conference. I then received evidence and documents, and held an investigation meeting.

[5] Ali'itasi appeared at the investigation meeting, affirmed her evidence, and answered my questions. Mr Brown gave brief oral submissions on her behalf. No one appeared for PHT at the investigation meeting. I am satisfied PHT was aware of the proceedings. Ms Quartermain had provided a written response and documentation to the initial claim and had, after extended time, provided further information that was taken as her evidence. Notice of the investigation meeting had by then been communicated. I checked with the Authority Officers and there was no communication received that Ms Quartermain or anyone else for PHT to indicate non-appearance and a reason for this.

[6] The Authority has the power to proceed if any party fails to attend an investigation meeting 'without good cause'². I considered the above circumstances and found no good cause not to proceed. Accordingly, I continued with the investigation meeting and now make this determination.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not recorded all the evidence and submissions, in this determination. I have set out my findings of

² Employment Relations Act 2000, Schedule 2, Clause 12.

fact and law and based on this I have expressed conclusions on issues and made orders as necessary to dispose of the matter.

Issues

[8] The issues I need to determine are:

- a. Did PHF terminate Ali'itasi's employment on 23 December 2021 effective immediately?
- b. If so, what was the reason for the termination?
- c. Was PHF justified to terminate Ali'itasi's employment?
- d. If PHF was not justified to terminate Ali'itasi's employment what remedies are to be ordered?
- e. Is there to be a reduction in any remedies due to employee contribution?
- f. Are costs to be awarded?

Further background to the employment relationship problem

[9] Ali'itasi commenced working for PHT signing an individual employment agreement (IEA) that contained a valid 90-day trial period clause; clauses relating to a process for restructuring and redundancy; a requirement of four weeks' notice for termination either for the 90-day trial period or redundancy; a description of the role as 'permanent fulltime' with hours of work Monday to Friday, 9.30am to 4.30pm (35-40) on a nominated salary. The role was expressed as 'Personal Assistant- intermediate level'. I understand Ali'itasi was to be an assistant to Ms Quartermain working at Ms Quartermain's home office with her. Ali'itasi described the job as helping PHT to organise community charity events.

[10] In mid-December 2021 Ms Quartermain and Ali'itasi had discussions about the summer break. Ali'itasi's evidence is that Ms Quartermain wanted to have a holiday and that she would not need Ali'itasi to work during this time. The length of the time for this proposed break changed over several discussions. It is Ali'itasi's evidence that the changes proposed by Ms Quartermain eventually extended the time to four weeks. Ali'itasi says she reluctantly agreed to this because she was concerned as Ms Quartermain told her she would not be paid because she was on a 90-day trial period.

[11] On 23 December 2021 Ali'itasi says Ms Quartermain rang her to come in an hour later than she would normally start. When she arrived, she says Ms Quartermain told her she was being dismissed due to redundancy and then gave her a letter confirming this (termination letter). The letter included that the dismissal was effective immediately. Ali'itasi says she became upset and questioned why she would not receive a notice period of 4 weeks. Ms Quartermain told her this was not available because Ali'itasi was on a 90-day trial period.

[12] Ali'itasi raised a personal grievance through her then representative on 3 March 2022.

Did PHF dismiss Ali'itasi on 23 December 2021 with immediate effect?

[13] The dismissal letter provided to Ali'itasi on 23 December 2021 was as follows:

THE PORT HILLS CHARITABLE TRUST

23 December 2021

Aliitasi Luamanuvae-Sua [address]

Dear Aliitasi [sic]

RE: TERMINATION OF EMPLOYMENT

As discussed with you earlier that The Port Hills Foundation Charitable Trust ~~who~~ [sic] is going through restructuring process until next year when all is becoming clear moving forward.

This letter is a formal notice in writing to confirm that your employment with The Port Hills Charitable Trust is terminated as from today 23 December 2021 under section 11 and 11.3 of your Employment Contract.

Please return all or any properties that belongs to The Port Hills Foundation as per your Employment Contract obligations. Your final pay will be in your account next Monday.

We thank you for your contribution and wish you all the best for your future endeavours.

Kind Regards

[signed]

Ms Leta Quartermain

President/Chief Executive Trustee

THE PORT HILLS FOUNDATION CHRITABLE TRUST

[14] I accept Ali'itasi's evidence that the above letter was given to her after Ms Quartermain told her she was to be made redundant. I find nothing in this letter inconsistent with Ali'itasi's evidence that she understood her employment was terminated by her employer

on 23 December 2021. Ali'itasi tells me that when she went to get her work diary that morning Ms Quartermain had ripped pages out of it saying they contained information about PHT. This is consistent with the letter's message to return everything to PHT.

[15] While I note other written reference from Ms Quartermain to say there were options given to Ali'itasi to return to work in the New Year this is inconsistent with the above letter and other various representations by PHT in documentation before the Authority that confirmed PHT made Ali'itasi redundant. I accept Ali'itasi's affirmed evidence that she understood those other roles mentioned verbally by Ms Quartermain were casual and not a return to her permanent full-time role. I do not find these apparent other options were things that could reasonably have meant that Ali'itasi has not been dismissed with immediate effect on 23 December 2021.

[16] Accordingly, I find that Ali'itasi was dismissed with immediate effect on 23 December 2021 from the permanent full time role she had only weeks before been employed to do.

What was the reason for the dismissal?

[17] PHT's documentation provided to the Authority states Ali'itasi was made redundant alongside reference to the 90-day trial provision in the IEA, an apparent double reason for the dismissal. There is no reference to the 90-day trial provision in the dismissal letter.

[18] It is not in dispute that Ali'itasi was employed based on a legitimate 90-day trial period. On the face of it, this means that on 23 December 2021 her employer could have dismissed her without giving reasons and without Ali'itasi being able to challenge the justification of the decision through a personal grievance³.

[19] However, the Employment Court has interpreted that notice is required to be given if an employer ends an employee's employment on a 90-day trial basis.⁴

³ Employment Relations Act 2000, ss 67A, 67B and 120.

⁴ *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] 7 NZELR 444.

[20] Even if it could be said, that PHT had the ability to dismiss based on a valid 90-day trial provision here, the lack of notice period given to Ali'itasi would be fatal to it being able to do so.⁵

[21] I further accept the submission for Ali'itasi that PHT could have sought advice to ensure it followed a process to give effect to its rights under the 90-day clause. That PHT had access to and could have obtained reliable advice is supported by its response to Ali'itasi's claim where there is a purported 'counterclaim' for legal costs, naming an apparent law firm.

[22] Accordingly, I find the reason for Ali'itasi being dismissed with immediate effect was by way of redundancy and not a 90-day trial provision. As such PHT cannot rely on protection from Ali'itasi's grievance claim.

Was PHF justified to dismiss Ali'itasi?

[23] Section 103A of the Act requires the Authority to assess whether an employer has shown that its decision to dismiss was justified based on what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. This includes asking whether the employer's substantive reasons were sufficient to justify the decision and whether the procedure the employer followed in making the decision was fair. Minor defects in the disciplinary procedure may not support a finding of unfair procedure if they have not had an unfair effect on the employee.

[24] I am satisfied that PHT was not justified to dismiss Ali'itasi from her permanent fulltime role by way of redundancy. My reasons follow.

[25] Section 11 of Ali'itasi's IEA is headed 'Restructuring and Redundancy'. The dismissal letter only quotes clause 11.3 which provides:

11.3 Redundancy is a situation where the position of employment of an employee is or will become surplus to the requirements of the employer's business.

[26] The dismissal letter did not refer to clauses 11.4 and 11.5 of the IEA which include:

⁵ Upholding analysis in the Employment Court: *Ioan v Scott Technology NZ Ltd* [2019] NZCA 386 at [27] to [30].

- a. a duty to consult if redundancy is considered including considering redeployment option but also providing the employee with 'sufficient information to enable understanding and meaningful consultation and shall consider the views of the employee with an open mind before making a decision as to whether to make the employee's position of employment redundant'
- b. that 4 weeks' notice is required (referencing Schedule 1)
- c. that in the event of redundancy no compensation is available.

[27] The IEA employer duties relating to the restructuring process are consistent with the overall justification test for dismissal under s103A of the Act outlined above at [23]. I find PHT failed to follow the process set out in the IEA before dismissing Ali'itasi based on redundancy. This had an unfair effect on her that was more than just a minor defect in the process.

[28] I find support for the above finding in Ali'itasi's affirmed evidence that the only discussions prior to 23 December 2021 about her not working over the Christmas break were those about Ms Quartermain wanting a holiday and changing the dates to a progressively longer break. I am satisfied that the dismissal came as a sudden event on 23 December 2021 with no prior discussions about restructuring or redundancy.

[29] PHT has provided no affirmed or sworn evidence to support that it proposed to restructure and how that would affect Ali'itasi's role. What documentation I have received from Ms Quartermain includes a document labelled 'Board resolution' signed by a 'secretary for the Board of trustees', Mr Evile. There is a signature dated 20 December 2021 and it states that the Board resolved on 14 December 2021 that Ali'itasi's employment would be terminated under various clauses of her IEA including the one that relates to the 90-day trial period and others that relate to redundancy. These clauses are beyond what was referred to in the dismissal letter. I have already found the 90-day trial period was not given as a reason for dismissal in that letter. The above 'resolution' further says that Ms Quartermain is to 'discuss with employee and serve the employee 'a termination letter in writing on 23 December 2021'.

[30] The above is untested evidence but if there was an internal decision made by the Trust, there is no reliable evidence that this was conveyed to Ali'itasi by Ms Quartermain before 23

December 2021. To the extent Ms Quartermain appears to say this (through material she has provided) is not accepted against the affirmed and straightforward evidence of Ali'itasi. As noted above Ali'itasi confirmed that restructuring and redundancy were never discussed with her before 23 December 2021.

[31] If the Board did resolve on 14 December 2021 to dismiss Ali'itasi by redundancy I also find it implausible that this decision would have been genuine given it had only hired Ms Ali'itasi four weeks before on a full-time permanent basis.

[32] Accordingly, I find that PHT was not justified to dismiss Ali'itasi and I will now consider remedies.

Remedies

Notice period of 4 weeks

[33] I agree with the submission that Ali'itasi ought to have been paid a notice period of 4 weeks. This is consistent with her IEA⁶ and therefore a contractual entitlement at termination. Four weeks' notice ended on 23 January 2022. I find Ali'itasi was employed to work a minimum of 35 hours per week on a salary that averages out to \$787.50 gross per week. She is therefore to be paid four times this figure which is \$3,150.00 gross. This figure is to be reduced based on amounts likely paid after the employment ended. I will discuss these now.

[34] According to bank records and a relevant payslip, PHT paid Ali'itasi a total of \$433.97 net in June 2022. This was approximately six months after a payslip (provided by PHT) for this payment was generated. The payslip shows the payment was based on \$225.00 gross for '10 hours' of 'public holidays' and '\$332.10' for 'holiday pay'.⁷ I accept this was a payment assigned to unworked public holidays that would have fallen during the notice period. I therefore deduct the proportion on this payslip labelled 'public holiday' in gross amount (\$225.00) from the four weeks' notice I have awarded. I will return below to the 'holiday pay' component on this payslip.

⁶ Individual Employment Agreement between *Ali'itasi Luamanuvae-Su'a* and *The Port Hills Foundation Charitable Trust*, Schedule 1.

⁷ Payslip for pay period ended 07 January 2021.

[35] I note further that Ms Quartermain's provided a further payslip that showed \$360.00 gross for '16 Hours' of 'public holidays.' That payslip is like the one mentioned above. It was also generated in January 2022, but it does not correspond to a bank entry in Ali'itasi's bank records. Other payslips do correspond. This supports that it was not paid. Ali'itasi also says she did not see this payslip or get paid this entitlement. I accept her affirmed evidence. I have not deducted this money from the awarded notice period.

[36] Accordingly, PHT is ordered to pay \$3,150.00 gross for Ali'itasi's notice period less \$225.00 gross paid by PHT towards 'public holidays' that fell during the notice period. The total to pay is \$2,925.00 gross.

Public holiday payments during notice period

[37] I have already ordered a four week notice period less money I find was paid for 'public holidays'. To further award for a balance of those public holidays that fell during the notice period would be a double up. This is because those days are already paid out as relevant daily pay or average daily pay⁸ within the notice period award.

Compensation

[38] Turning to compensation under s 123(1)(c)(i) of the Act. This is an award for the humiliation, loss of dignity and injury to feelings that an applicant suffers because of the grievance.

[39] I accept Ali'itasi's affirmed evidence (in part supported by Inland Revenue records) that she left a permanent albeit part time job in retail to accept the permanent full-time position with PHT. I accept that she would not have done so if she had realised Ms Quartermain would not require her for four weeks unpaid over January and then without warning change this to summarily dismissing her on 23 December 2021.

[40] Ali'itasi describes being excited about her new position with PHT and that it would improve her financial position because it was full time permanent work. She was excited about her progression into work of more substance, learning more skills. I accept she had enthusiastically told her extended family about all of this. I observed Ali'itasi as young, very

⁸ Holidays Act 2003, s49.

able, and well presented. I found her evidence plausible and straightforward. I accept her evidence that she suffered considerable distress about how her permanent full-time employment ended so soon after it started and so suddenly. She described crying when Ms Quartermain told her she was dismissed on 23 December 2021. I accept this happened. In these circumstances I find it highly likely that (as Ali'itasi explains) she felt humiliated when extended family enthusiastically asked about her 'new' job at Christmas gatherings and that she had to tell them she had lost her job.

[41] I further accept that Ali'itasi suffered serious distress financially (her bank records support this). The sudden dismissal was right on Christmas on a day Ali'itasi had understood was the last day before the summer break, a break I accept she likely agreed to albeit reluctantly, given the lack of pay and the lack of anything resembling the required statutory closedown period notifications⁹.

[42] Ms Quartermain has put forward a response for PHT that Ali'itasi's bringing of her grievance was for 'her own personal gain advantage and is outrageous'. She has further written that Ali'itasi left on good terms with a prospect of jobs in the New Year with PHT and that Ms Quartermain gave her a Christmas gift. PHT has also written that Ali'itasi 'refused to accept' she had been terminated based on redundancy 'surplus to requirements'. Ms Quartermain's stated position for PHT is inconsistent with what I have found above and shows at best confusion and a lack of insight about how to treat an employee fairly and reasonably. Again I note that it was open for PHT to get advice and that it claims to have done so in its 'counterclaim' for legal costs. I find all of this adds to the severity of the effect this matter had on Ali'itasi not in the least then being criticised as self-serving for bringing her grievance claim.

[43] Ali'itasi has provided some independent written evidence about how she did not cope emotionally with the sudden loss of her job and the ongoing unresolved situation falling from that. While I take this evidence as reliable, I am satisfied that the circumstances of the grievance exacerbated rather than fully caused all the effects put forward. I accept however that the suddenness and the confusing circumstances around the dismissal adversely exacerbated things for Ali'itasi. I accept that this also contributed to her ability to get further

⁹ Holidays Act 2003, sections 29 to 35.

employment, a continued stressor that continued several months beyond the end of the employment with PHT.

[44] Overall, I find an appropriate award of compensation is \$8,000.00.

Lost earnings post termination

[45] It is submitted that Ali'itasi should be paid for 12 weeks of lost remuneration due to the grievance.

[46] To consider whether Ali'itasi should be reimbursed for wages lost I must first consider the difference between 12 weeks post the end of Ali'itasi's notice period (23 January 2022) and the date when she secured further employment. The Act requires the loss to be calculated on the lesser of the two situations¹⁰.

[47] I am satisfied that Ali'itasi did not secure employment before 23 April 2022 being 12 weeks after the end of her contractual notice period. I will therefore consider lost wages for 12 weeks from after her notice period ended.

[48] I accept the evidence that Ali'itasi provided of her attempts to seek employment at the beginning of 2022 and that she tried to mitigate her loss as best she could. This is also supported by a report from her counsellor who referred to hearing from Ali'itasi at this time about her trying to obtain other work because of the ending of her employment. I also note that Ali'itasi had a reputable relation trying to help her by alerting her to suitable job advertisements. Messages support this.

[49] I accept Ali'itasi's evidence that it was difficult to apply for jobs over the Christmas and New Year period, a time that employers are unlikely to recruit.

[50] I also accept that Ali'itasi's attempts to obtain new employment were likely hampered due to the way her employment ended so abruptly by 'redundancy' when she had only worked just under 6 weeks. It is plausible, as she tells me, that she could no longer trust Ms Quartermain to give a reliable reference (I accept a reference was offered) because of the way she had handled the end of Ali'itasi's employment (as outlined above in my findings). I

¹⁰ Employment Relations Act 2000, s123(1)(b) and s128.

accept as plausible Ali'itasi's explanation that one job application at a real estate agency did not progress when Ali'itasi could not provide sufficient details about the ending of her employment at PHT by way of redundancy. I find it likely that a prospective employer would consider this unusual and may doubt the likelihood of a redundancy after such a short timeframe of employment. In short, the situation created by the handling of the unjust dismissal by Ms Quartermain for PHT and a continued likely apparent lack of understanding or confusion about this worked against Ali'itasi's attempts to get further employment.

[51] Accordingly, I find that PHT is to pay Ali'itasi reimbursement for 12 weeks lost wages which multiplied by 35 hours at \$22.50 gross per hour is a total of \$9,450.00 gross.

Holiday pay

[52] Ali'itasi is entitled to holiday pay as an 8% percentage of her total gross earnings for her period of employment because she did not work for a year.¹¹ I am satisfied that apart from the above reference at [34] to a gross holiday pay entitlement of \$332.10 PHT has not paid this entitlement to Ali'itasi. The total gross earnings from PHT recorded in Ali'itasi's IRD records to 31 March 2022 is \$4,483.35. I add to this the orders made above: \$2,925.00 gross for the notice period and \$9,450.00 gross for lost wages, a total of \$16,858.35 gross. Taking 8% of this is \$1,348.67. From this I deduct the 'holiday pay' calculated in gross as \$332.10 in the PHT payslip referred to above at [34].

[53] Accordingly, I order PHT to pay holiday pay of \$1,016.57 gross.

Is there to be a reduction in any remedies due to employee contribution?

[54] I do not find there is any reason before me to support a reduction of remedies¹² due to contribution by Ali'itasi.

Summary of Orders

¹¹ Holidays Act 2003, section 23.

¹² Employment Relations Act 2000, section 124.

[55] The Port Hills Foundation Charitable Trust is ordered to pay Ali'itasi Luamanuvae-Su'a the following:

- a. \$2,925.00 gross for unpaid notice
- b. \$8,000.00 compensation under s 123(1)(c) of the Act
- c. \$9,450.00 gross for 12 weeks lost earnings under s 128 of the Act
- d. \$1,016.56 gross for holiday pay under s 23 of the Holidays Act 2003.

Costs

[56] 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, Ali'itasi 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 PHT 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.

[57] If the Authority is asked to determine costs, the parties can expect the Authority to apply its usual daily rate unless circumstances or factors require an upward or downward adjustment of that tariff. If an uplift is sought as appears to be indicated in Ali'itasi's brief of evidence, I would expect documentation to support this including clearly narrated representative costs in invoices and any other relevant communications in documentary form.¹³ This comment is not to be interpreted as giving any expectation of the outcome of any future decision about costs.

Antoinette Baker
Member of the Employment Relations Authority

¹³ For further information about the factors considered in assessing costs, see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.