

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 222
5338481

BETWEEN SANJESHI SHALINE
 CHANDRA
 Applicant

AND GRIFFIN'S FOODS LIMITED
 Respondent

Member of Authority: K J Anderson

Representatives: P Muller, Counsel for Applicant
 L Turner, Counsel for Respondent

Investigation Meetings: 24 August and 6 December 2011 at Auckland

Submissions Received: 25 January 2012 for the Applicant
 16 February 2012 for the Respondent

Determination: 29 June 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Ms Chandra claims that she was offered and she accepted, employment with the respondent Griffin's Foods Limited (GFL) and a date of commencement was agreed. However, before Ms Chandra was able to commence her employment with GFL, the offer of employment was withdrawn. Ms Chandra says that she had an employment relationship with GFL because she was a person intending to work pursuant to s.6(1)(b)(ii) of the Employment Relations Act 2000 (the Act). Ms Chandra says that she was unjustifiably dismissed and she asks the Authority to find that she has a personal grievance and award her the remedies of reimbursement of wages for 12 weeks and compensation, pursuant to s.123 of the Act. Ms Chandra also claims that GFL breached its good faith obligations under s.4 of the Act and seeks a remedy accordingly.

[2] Conversely, GFL says that Ms Chandra never became an employee of the company and although the parties anticipated that they would enter into an employment relationship, Ms Chandra never signed an employment agreement. Further, the role that had been offered to Ms Chandra subsequently became surplus to the company's requirements and as a consequence, the offer of employment was withdrawn. GFL also denies that there was a breach of the good faith provisions of the Act.

Background Facts and Evidence

[3] Ms Chandra applied for the position of Snack Line Manufacturing Co-ordinator. She was successful with her application and was informed of this on 16th February 2011; by Mr Trevor Rollinson, the Manufacturing Manager for GFL. The evidence of Ms Chandra is that she spoke to Mr Rollinson on the phone on that day and he confirmed her appointment. Mr Rollinson subsequently emailed Ms Chandra an employment agreement. The email from Mr Rollinson informs Ms Chandra that:

I have attached the soft copy – please note the message from Julie-Ann below ... to put it into context – this is only a formality in our process, but if you're not comfortable wait until the hard copy, which can be collected tomorrow from here if you like.

The reference by Mr Rollinson to "*the message from Julie-Ann below*" is to an extract from a separate email from Ms Julie-Ann Eggermont, the Senior Human Resources Manager for GFL, which informs that:

[... waiting sign off it may be subject to administrative changes following final HR Director sign off.

[4] Ms Chandra replied to Mr Rollinson via an email, also dated 16 February 2011:

Hi Trevor,
As per our telecom today, I accept your offer with the terms and conditions stipulated in the electronic IEA copy. I am off to Fiji early tomorrow morning and come back to Auckland on Thursday 24th Feb. Will call you when I get back so that can arrange a time to complete formality and sign the hard copies. Also, I would like to start my new role @ ETA on Tuesday 15th March.
Hope all is good
Kind Regards,
Jesh Chandra

[5] The common evidence is that following her acceptance of the position with GFL, Ms Chandra received several emails from Mr Rollinson informing of various

operational matters that Ms Chandra should know about in anticipation of beginning her employment with GFL; and also an email relating to “Injury Management Training” to be scheduled for her upon her commencement of employment. Ms Chandra responded to these emails on 28th February 2011; thanking Mr Rollinson for keeping her “in the loop” and she informed that she was looking forward to 15th March; the date of the commencement of her employment with GFL.

[6] Mr Rollinson is no longer employed by GFL and it is the evidence of Ms Eggermont that as the Human Resources Manager, it was her expectation that Ms Chandra would have to “come in” to sign the employment agreement to “formally accept it.” However, on the basis of her agreement with Mr Rollinson, as confirmed in writing, Ms Chandra says she gave notice of resignation to her employer at that time.

The withdrawal of the offer of employment

[7] The evidence of Ms Eggermont is that parallel to the recruitment process for Ms Chandra, GFL were engaged in discussions with Mr Keith Riley pending his subsequent employment as the Wiri Site Manager. The evidence of Mr Riley is that during his recruitment process, he was made aware of a proposed new management structure that had been designed by the “exiting” Site Manager. The new structure included the role of Snack Line Manufacturing Co-ordinator; the position that Ms Chandra had accepted. Mr Riley signed and returned his employment agreement with GFL on 7th March 2011. And his evidence is that about the same time, he contacted Mr Joe Saroufim, the Operations and Supply Chain Director, and expressed concerns about the proposed new management structure and the associated employment of Ms Chandra in that structure. Mr Riley says that the issue for him was that under the proposed structure, the day role Snack Line Manufacturing Co-ordinator, at a salary of over \$80,000 was not appropriate as it would not ensure that there was “strong leadership” throughout the full production process, as it operates on a shift basis. As a consequence, it was agreed (with Mr Saroufim) that the role of Snack Line Manufacturing Co-ordinator was not required.

[8] The evidence of Mr Saroufim is that upon accepting Mr Riley’s concerns about the proposed management structure for the Wiri site, he contacted Ms Eggermont and asked her to withdraw the offer of employment that had been made to

Ms Chandra and to “hold off” on any recruitment for co-ordinator roles. On 9th March 2011, Ms Eggermont sent an email to Ms Chandra:

Morning Jesh,

Unfortunately we have decided to withdraw our letter of offer to you. Please could you come into [sic] discuss this with me today at the Wiri site.

Ms Eggermont followed the email with a phone call and spoke to Ms Chandra whom was shopping at the time and had not seen the email.¹ Shortly after speaking to Ms Eggermont, Ms Chandra attended a meeting with Ms Eggermont and Mr Saroufim at the Wiri premises. While the respective evidence of Ms Chandra and Ms Eggermont reveals some variances in regard to exactly what was discussed at the meeting, there is enough consistency in their evidence to conclude that there were two distinct aspects to the discussion. Firstly, it was explained to Ms Chandra that GFL had decided to adopt a different management structure with the result that the position of Snack Line Manufacturing Co-ordinator was no longer available to Ms Chandra. Ms Chandra denies that this was discussed with her but this seems implausible given the overall evidence about the review of the proposed management structure. Secondly, and I have to say, inexplicably, Ms Chandra was asked to account for what was perceived by GFL to be a discrepancy in regard to the dates shown on Ms Chandra’s CV regarding the time she had been employed with a past employer. This led to Ms Chandra revealing certain information about the reasons for her departure from this employer and her experiences with her most recent employer, the details of which are not relevant to the determination of this matter. Indeed, I make the observation that while GFL now appears to acknowledge that Ms Chandra has legal standing to pursue a personal grievance, as a person intending to work under s.6 of the Act; at the time of the meeting on 9th March 2011, this was not the case and the matter of revisiting the details of Ms Chandra’s CV appears to have been a somewhat misplaced attempt by GFL to give another form of justification to the decision to not employ her. A matter I will return to later.

[9] The evidence of Ms Eggermont (and that of Mr Saroufim) is that while GFL did not accept that an employment relationship had been formed with Ms Chandra, an

¹ The evidence of Ms Chandra is that she received the email from Ms Eggermont on 9th March 2011 and then came to the GFL Wiri site on 10th March 2011 for a meeting but on the weight of the evidence I conclude that is not correct.

offer was made to employ her from 15th March 2011. However, Ms Chandra's commencement would be on the basis that she would be given notice of the redundancy of her position "immediately" and it may also be "necessary" to raise issues about the reasons Ms Chandra had given in regard to her departure from previous employment. Ms Chandra denies that there was a discussion about "a proposed redundancy" or that an offer for her to commence work (and then be made redundant) was made, but I conclude that it is more probable that the evidence of Ms Eggermont and Mr Saroufim is correct. However, the evidence is inconclusive on the response of Ms Chandra. The oral evidence of Mr Saroufim is that he understood that Ms Chandra "basically declined" the offer to commence work on 15th March 2011 and also a "without prejudice" offer that was made to her. The evidence of Ms Eggermont is that the meeting on 9th March 2011 concluded with an unsuccessful "without prejudice" discussion.

[10] Finally, the evidence for GFL is that the role of Snack Line Manufacturing Co-ordinator did not and has not, eventuated.

Analysis and conclusions

[11] Ms Chandra says that she entered into an employment relationship with GFL and while it is accepted that she did not commence employment with the company, for the purposes of pursuing a personal grievance, she can be defined as an employee under the provisions of s.6(1)(b)(ii) of the Employment Relations Act 2000. The closing submissions for GFL now concede that given the communications between Ms Chandra and Mr Rollinson, she was a person intending to work pursuant to s.6(1)(b)(ii) of the Act hence an analysis of that issue is not required. It is enough for me to record that I have found that Ms Chandra was a person intending to work thereby obtaining the legal status of "employee"² with the associated ability to pursue a personal grievance under sections 102 and 113 of the Act.

[12] I also find that Ms Chandra was dismissed from her employment and that the dismissal was unjustifiable. This is because Ms Chandra was not consulted or forewarned that she was no longer going to be employed by GFL. I accept the submission for Ms Chandra that there should have been some consultation to allow

² And also s.5 of the Act.

Ms Chandra to digest the withdrawal of employment by GFL; and an opportunity to make appropriate representations before a final decision was made. While GFL offered to employ Ms Chandra on a conditional basis, i.e. the role would immediately be declared to be redundant, that was, in reality, Hobson's choice for Ms Chandra and I conclude, not something that was realistically acceptable. The weight of the evidence largely confirms this. I find that Ms Chandra has a personal grievance.

Remedies

[13] Under the provisions of s.123 of the Act, having found that an employee has a personal grievance, the Authority may, provide one or more remedies, including reimbursement of lost wages and compensation for humiliation, loss of dignity and injury to feelings.

(a) *Reimbursement of lost wages*

[14] At s.128(2) of the Act, if the Authority determines that an employee has a personal grievance, and there has been lost remuneration because of the grievance, the Authority:

[... must, whether or not it provides for any of the other remedies provided for in s.123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to three months' ordinary time remuneration.

And then at s.128(3) of the Act the Authority has a discretion, in appropriate circumstances, to order that a sum greater than the equivalent of three months' wages be paid.

[15] However, due to the particular circumstances pertaining to this matter an issue arises as how the amount of lost remuneration for Ms Chandra should be assessed. It is submitted for GFL that given that as of the date of the meeting with her on 9th March 2011, the position offered to Ms Chandra did not exist, the quantum of income due to Ms Chandra should be calculated on the basis of what she would have been entitled to if GFL had followed a proper consultation process, as it would be expected to apply in a redundancy setting. The argument for GFL is that if Ms Chandra had accepted the offer to commence employment on 15th March 2011, a consultative approach, pertaining to the role of Snack Line Manufacturing Co-ordinator not being available, would have been commenced immediately and hence GFL would have

been in a position to reach a “substantively and procedurally justified decision” within one week with a subsequent notice period of one month: total time frame for payment of wages being five weeks. On the other hand, it is submitted for Ms Chandra that an appropriate consultation period would have been three weeks and then a notice period of one month: total time frame for payment of wages being seven weeks.

[16] But then it is further submitted for Ms Chandra that pursuant to s.128(2) of the Act, once it is established that an employee has a personal grievance and has lost remuneration as a result of the grievance, the Authority “must” whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay the employee the lesser of a sum equal to the actual lost remuneration or to three months’ ordinary time remuneration; and then under s.128(3) there is a discretion to award wages for a period greater than three months.

[17] The Authority has been referred to *Trotter v Telecom Corporation of New Zealand Ltd*³ a case where the Chief Judge (then) of the Employment Court engaged in a comprehensive analysis of the principles that should apply when undertaking an assessment of lost remuneration. Referring to the statutory discretion available under the Employment Contracts Act 1991 (similar to that currently existing under the Employment Relations Act), Chief Judge Goddard stated:

What is the limit in the case of this particular statutory discretion? The most obvious proposition is that there is no power to award more than the loss. The second is that the discretion is there for the benefit of applicants for its favourable exercise, so once it has been shown that remuneration has been lost as a result of a personal grievance, there should be reimbursement of that loss unless some good reason is shown by the respondent to exist for depriving the applicant of a part of that reimbursement. I have already mentioned as an example the failure to discharge the duty to mitigate the loss by diligently seeking employment after the dismissal. There may be other good reasons for diminishing the full reimbursement.

And, with relevance to Ms Chandra’s circumstances (in my view), Judge Goddard went on to conclude that:

Speculation about or comparison with the damage that could have been caused lawfully by a justifiable dismissal is not one of them for the grievance consists of a complaint that the respondent proceeded unjustifiably.

[18] I conclude that the respective discussion about an appropriate consultation period for the “redundancy” of the Snack Line Manufacturing Co-ordinator role falls

³ [1993] 2 ERNZ 659.

within the category of “*speculation about or comparison with the damage that could have been caused lawfully by a justifiable dismissal*” mentioned by Chief Judge Goddard (above), hence I can see no good reason why Ms Chandra should not be awarded the statutory minimum of three months’ wages pursuant to s.128(2) of the Act. However, taking into account all of the circumstances, including that it is established that the position Ms Chandra was appointed to ceased to exist and there is no evidence of a similar role; and the lack of any tangible evidence of Ms Chandra attempting to mitigate her loss, I am not inclined to exercise the discretion available under s.128(3) to award loss of remuneration for a longer period.

(b) *Compensation*

[19] Ms Chandra asks to be awarded the sum of \$20,000 pursuant to s.123(1)(c)(i) of the Act. There is little in the submissions for Ms Chandra to suggest why there should be such a high award in the circumstances; nor is there any reference in Ms Chandra’s written witness statement. Giving oral evidence at the first investigation meeting Ms Chandra told of being “interrogated” and being upset and crying due to her past employment record being raised at the meeting on 9th March 2011. Conversely, the evidence of Ms Eggermont is that Ms Chandra “looked really comfortable,” that she had taken her shoes off and upon Ms Eggermont returning to the meeting room after a break, she found that Ms Chandra had her [Ms Eggermont’s] jacket on. Ms Eggermont says that Ms Chandra did not cry during the meeting.

[20] Nonetheless, I accept that Ms Chandra was subjected to some unnecessary and unreasonably intense scrutiny in regard to her previous employment record. Given that GFL has obviously reached a conclusion that there was no longer a position available for Ms Chandra and that the purpose of meeting with her was to tell her this, I struggle to see what the purpose of the enquiry into her past employment was. This enquiry simply compounded the difficulties for Ms Chandra given that GFL had suddenly, without notice, informed her that there was no longer a role for her. Ms Chandra had also resigned from her existing employment on the strength of agreement with GFL. I accept that overall this was a hurtful and humiliating experience for Ms Chandra warranting compensation in the sum of \$5,000.

[21] The submissions for Ms Chandra ask that she be paid “damages” in the sum of \$20,000 for alleged breaches of the obligations of good faith provided by s.4 of the Employment Relations Act 2000 (the Act). The submissions on this matter are vague and also make mention of the “*Beech family complaint*” and one can only draw the conclusion that there has been a “cut and paste” from some other submissions that Mr Muller was involved with. Given the lack of evidence and associated submissions about this, I must dismiss this claim.

Determination

[22] For the reasons set out above, I find that:

- (1) Ms Chandra was a person intending to work pursuant to s.6(1)(b)(ii) of the Act.
- (2) Ms Chandra has a personal grievance as she was unjustifiably dismissed.
- (3) Pursuant to ss 123 and 128 of the Act, Griffin’s Foods Limited shall pay to Ms Chandra three months’ wages being the gross sum of \$20,910.00 (calculated on an annual salary of \$83,640).⁴
- (4) Pursuant to s.123(1)(c)(i) of the Act Griffin’s Foods Limited shall pay to Ms Chandra compensation in the sum of \$5,000.00.

Costs:

[23] Costs are reserved. The parties are invited to resolve the matter of costs if they can. In the event a resolution cannot be reached, the applicant has 28 days from the date of this determination to file and serve submissions with the Authority. The respondent has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority

⁴ According to the evidence of Mr Saroufim at para 12.