

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2021] NZERA 205  
3111258

BETWEEN                      JANEY HAYWARD  
   Applicant

AND                              CIVIC LIMITED  
   Respondent

Member of Authority:      Vicki Campbell

Representatives:            Alison Maelzer and Eloise Callister-Baker, counsel for  
   Applicant  
   Justine Foden, counsel for Respondent

Investigation Meeting:     8 April 2021

Submissions Received:    14 and 20 April 2021 from Applicant  
   19 April 2021 from Respondent

Determination:              17 May 2021

---

**DETERMINATION OF THE AUTHORITY**

---

**A.      Ms Hayward was unjustifiably dismissed. Civic Limited is ordered to pay the following sums within 28 days of the date of this determination:**

**(a) \$30,000 gross lost wages under s 123(1)(b) of the Employment Relations Act 2000; and**

**(b) \$25,000 under s 123(1)(c)(i) of the Employment Relations Act 2000.**

**B.      Ms Hayward's application for penalties is declined.**

**C. Costs are reserved.**

**Employment relationship problem**

[1] Civic Limited (Civic) performs streetscape and parks cleaning and maintenance services. Most of its work is undertaken for local government councils, usually as a sub-contractor to head contractors. Its services include public facility cleaning, street bin emptying, bus shelter cleaning, litter collection and graffiti removal among other things.

[2] Ms Hayward is an experienced independent contractor having undertaken short and longer term engagements for clients in finance related work. Ms Hayward worked for Civic on a number of short term engagements as an independent contractor before being offered and accepting a permanent employed role as Finance Manager. Ms Hayward entered into a written employment agreement with Civic on 5 February 2020.

[3] In March 2020 New Zealand went into full lockdown as a result of the COVID-19 pandemic. Like a number of employees across New Zealand Ms Hayward worked from home during the lockdown.

[4] On 27 April 2020 Ms Hayward was given notice of her dismissal by reason of redundancy. Her last day of employment was 22 May 2020 although her last working day was 11 May 2020 and her final pay was paid out on that date.

[5] Ms Hayward challenges the ending of her employment which she says was unjustified. Ms Hayward also claims Civic breached its statutory duty of good faith and the terms of her employment agreement and has asked the Authority to impose penalties for the breaches.

[6] Civic denies Ms Hayward's dismissal was unjustified, that it breached the terms of the employment agreement or its statutory obligations of good faith. Mr Bjorn Revfeim, a director and Civic's General Manager, says he and Ms Hayward agreed on 20 April 2020 that her employment would end by reason of redundancy after he had raised concerns about their relationship and behavioural issues with her.

**Issues**

[7] In order to resolve Ms Hayward's application I must determine:

- (a) Was Ms Hayward's dismissal by reason of redundancy unjustified?
- (b) If the answer to (a) is yes, what, if any, remedies should be awarded?
- (c) Should the remedies be reduced for contribution?
- (d) Did Civic breach the terms of Ms Hayward's employment agreement?
- (e) Did Civic breach its statutory obligations of good faith?
- (f) If the answer to (d) and (e) above is yes, what, if any penalties should be imposed?

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. While I have not referred in this determination to all the evidence and submissions received I have carefully considered all relevant material lodged with the Authority.

### **Background**

[9] Throughout March staff were updated on a regular basis about the impacts the lockdown was having on work and the company's cash-flow situation. This included information about possible wage reductions. On 26 March 2020 Ms Hayward emailed Mr Revfiem and told him that as a person in the highest salary group she would accept a greater salary reduction for a temporary period. Mr Revfiem confirmed he intended to continue paying staff who were working including managers. In response Ms Hayward confirmed that her offer of a reduction stood.

[10] On 5 April 2020 Mr Revfeim advised all employees, including Ms Hayward, that salaries of all admin and management roles would be reduced between 20 and 25 per cent. Employees were invited to contact Mr Revfeim if they strongly disagreed or would face financial hardship. Ms Hayward did not respond to this email.

[11] On 9 April 2020 Mr Revfeim emailed Ms Hayward and advised her that she had been ear-marked for a 25 per cent reduction to her salary. Mr Revfiem relied on Ms Hayward's advice to him on 26 March 2020 when he made this decision.

[12] The following day Mr Revfeim set out in a further email some questions and answers to assist in clarifying statements made in his 5 April 2020 email. He confirmed that the salary reductions would take affect the following week and that staff were expected to continue working during the lockdown.

[13] On 20 April Mr Revfiem contacted Ms Hayward by telephone. The call had been scheduled on or about 16 or 17 April 2020. It was common ground that during the call Mr Revfiem told Ms Hayward he was unhappy with their business relationship as it was not working well. This was not news to Ms Hayward, who had raised concerns with Mr Revfeim about a number of business and accounting decisions he had made. By this time in the employment relationship Ms Hayward was not engaging as she believed her opinions were not respected or valued.

[14] After Ms Hayward agreed with Mr Revfeim that their business relationship was not working well, Mr Revfeim asked her what she would do in his position. Ms Hayward told Mr Revfeim she would make her redundant. In answer to another question about what Ms Hayward would do now, Ms Hayward told Mr Revfeim her life would return to normal. Her reference to “normal” was a return to contracting rather than working as a permanent employee.

[15] When asked about what notice period Ms Hayward expected, she pointed out that her employment agreement required four weeks’ notice. The call ended when Ms Hayward asked Mr Revfiem to email her formalising what he wanted to do.

[16] In his email that day Mr Revfiem thanked Ms Hayward for her time on the call and apologised the meeting could not be held face-to-face. He then set out the challenges being faced by Civic including the loss of a contract in Wellington. Mr Revfiem advised Ms Hayward (verbatim):

As you are aware I am proposing changes to occur to resolve these issues which involves restructuring the Finance and Admin Support positions over the coming months.

As mentioned, unfortunately your role as Finance Manager will be affected.

I do want to ensure that any exit from Civic is done in a manner which minimises impact on yourself. As you mentioned your IEA does have a 4 week notice period. I did ask if there are any scenarios that suited you better, ie, leaving sooner, etc. If anything comes to mind, plesase let me know before Thursday 9am?

Otherwise I suggest we keep with the 4 week notice period and I ask that you work part of that notice period to complete a couple of items (ie March Management Accounts) and once completed you would be free to finish your notice period not working.

As mentioned above, please give me any feedback in before Thursday.

[17] On 22 April Ms Hayward responded to Mr Revfiem's email pointing out that while he did not mention redundancy it appeared she was being given immediate notice with an imminent departure with no alternatives. Ms Hayward advised Mr Revfiem that if that is what he was intending she would like some time to consider her position and requested information about how her role would be affected. Ms Hayward pointed out that one employee would soon be leaving the finance department and at a meeting earlier that morning Mr Revfiem had indicated that he expected to see an increase in work. Ms Hayward pointed out that these factors would mean the work of the finance department would increase.

[18] In response Mr Revfeim advised Ms Hayward he held concerns about her behaviour and how they were interacting, that they were not in agreement on work priorities or work matters. Mr Revfeim reminded Ms Hayward that he had spoken to her a few times during the past few months about her behaviour and attitude. Mr Revfeim told Ms Hayward her role would be made redundant, there were no plans to have a similar role and Civic was looking to outsource its management accounting work.

[19] On 24 April 2020 Ms Hayward wrote to Mr Revfeim setting out her concerns about the lack of consultation, breaches of good faith, and the reasons why she considered her role was necessary. Ms Hayward appears to also resile from her 26 March offer when she raised concerns about the reduction to her salary which had taken effect on 12 April 2020. Despite Mr Revfiem's belief that Ms Hayward had consented to the reduction he reimbursed the full amount of the reduction.

[20] Despite Ms Hayward's feedback she was given four weeks' notice on 27 April 2020 of her dismissal by reason of redundancy.

### **The law**

[21] In order for a redundancy to be justified Civic must demonstrate that the decision to dismiss was what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. I must consider whether Civic met

the minimum standards of procedural fairness outlined in s 103A of the Act and whether it made a decision to terminate the employment relationship on substantively justified grounds.

[22] The Court of Appeal considered the application of section 103A in a redundancy setting in *Grace Team Accounting Limited v Brake*.<sup>1</sup> That decision upheld the earlier Employment Court decision where the Court confirmed employers must show that a decision to make an employee redundant is genuine and based on business requirements.<sup>2</sup> This requires the Authority to scrutinise the reasons relied on by the employer in making its decision to dismiss.

[23] The genuineness of a redundancy is an important aspect of the Authority's investigation. Once that is established, if an employer concludes an employee is surplus to its needs, the Authority is not to substitute its business judgement for that of the employer.<sup>3</sup>

[24] Section 4 of the Act requires parties to an employment relationship to deal with each other in good faith when restructuring. Parties are to be active and constructive in establishing and maintaining a productive employment relationship in which they are responsive and communicative. The statutory obligations of good faith require employers to provide affected employees with access to information relevant to the continuation of the employee's employment and an opportunity to comment on the information before the decision is made.

[25] The requirements in relation to consultation have been summarised by the Employment Court as being:<sup>4</sup>

Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and deciding what will be done. Consultation must be a reality, not a charade. Employees must know what is proposed before they can be expected to give their view on it. This requires a provision of sufficiently precise information, in a timely manner. The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.

---

<sup>1</sup> *Grace Team Accounting Ltd v Brake* [2014] NZCA 541.

<sup>2</sup> *Brake v Grace Team Accounting Ltd* [2013] NZEmpC 81.

<sup>3</sup> Above n 1 at [98].

<sup>4</sup> *Stormont v Peddle Thorp Aitken Limited* [2017] NZEmpC 71 at [54]; [2017] ERNZ 352 (2017) 14 NZELR 789

[26] Ms Hayward's employment agreement did not define redundancy. In the absence of a definition I have used the commonly understood meaning. What is required is that the employee is superfluous to the needs of the business.<sup>5</sup>

[27] Despite not defining redundancy, Ms Hayward's employment agreement at clause 13.10 requires Civic to consult with her regarding the possibility of redundancy except in exceptional circumstances.

[28] The employment agreement requires consultation to be undertaken before a decision to proceed with redundancy is made including whether there are any alternatives to dismissal, such as redeployment to another role. The terms of the employment agreement also require Civic to provide Ms Hayward with sufficient information to enable understanding and meaningful consultation. Civic undertakes to consider Ms Hayward's views with an open mind before making a decision.

#### **Was the redundancy for genuine reasons?**

[29] Mr Revfiem has taken Ms Hayward's comment to his hypothetical question on 20 April 2020 as consent for him to proceed to disestablish her position and dismiss her by reason of redundancy. While he may legitimately have held that view during the call, his email sent to her immediately following the call make no reference to redundancy nor to any agreement that may have been reached and on which he wished to rely.

[30] Mr Revfiem held some serious concerns about Ms Hayward's interactions with him and her behaviour in general. For the following reasons I find the redundancy was not for genuine reasons:

- (a) the swiftness with which Mr Revfiem seized upon Ms Hayward's answer to his question, that if she was he, he would make her redundant, was largely motivated by not having to deal with the interpersonal and behavioural issues;
- (b) Ms Hayward's opposition to being made redundant was clear on 22 April 2020. At that time Mr Revfiem was aware there was no agreement to Ms

---

<sup>5</sup> Above n 1 at [47].

Hayward being made redundant and this ought to have given him cause to press pause;

- (c) Ms Hayward's redundancy was inconsistent with a statement Mr Revfiem made to its bank on 27 March 2020 that Civic was planning to retain all staff but pay 80 per cent of wages;
- (d) Mr Revfiem did not disclose to Ms Hayward, his intention to outsource her role, until after he had confirmed her notice period;
- (e) Mr Revfiem does not appear to have considered what, if any cost savings would be made by disestablishing Ms Hayward's role and whether those costs savings were necessary for the ongoing viability of the business;
- (f) No other employees were made redundant;
- (g) Civic was in receipt of a government wage subsidy to cover Ms Hayward's salary. Receipt of the subsidy meant Civic was contractually obliged to use its best endeavours to retain all employees named in its application which included Ms Hayward. Mr Revfiem acknowledged that he did not comply and has since refunded the subsidy Civic received in respect of Ms Hayward's wages.

[31] The decision to dismiss Ms Hayward by reason of redundancy was not a decision an employer acting fairly and reasonably could make in all the circumstances at the time the decision was made. Accordingly her dismissal was unjustified.

***Was a fair process followed?***

[32] In the event that I am mistaken in my conclusions that the redundancy was not genuine, and for the sake of completeness, I have considered whether Civic has met the minimum standards of procedural fairness.

[33] As stated earlier s 4 of the Act required Civic to provide Ms Hayward with access to information relevant to the continuation of her employment and an opportunity to comment on that information before a decision was made. While an employer is entitled to have a working plan in mind it must provide sufficiently precise

information, in a timely manner before an employee can be expected to give their view on it.<sup>6</sup>

[34] Mr Revfiem acknowledged at the investigation meeting that he did not provide Ms Hayward with any specific information before making the decision to dismiss her by reason of redundancy. It was common ground that as the Finance Manager, Ms Hayward had access to all of Civic's financial records and had received a copy of the updated forecast that had been sent to Civic's bank on 27 March 2020.

[35] Mr Revfiem says Ms Hayward made the suggestion that she be made redundant and therefore had consented to the redundancy. While Ms Hayward's suggestion on 20 April 2020 could have been construed as implicit consent, two days later, she had made it clear to Mr Revfiem that she did not consent and requested more information about the reasons why she was given notice of redundancy.

[36] Another defect in the process used by Civic included the failure to advise Ms Hayward before the 20 April 2020 telephone call, what was to be discussed. Mr Revfiem told me the purpose of the call was to have a chat about Ms Hayward's conduct because it was having an adverse impact on him, her colleagues and the business. He told me he wanted to chat with her about how she was not meeting his reasonable expectations of her role and that their working relationship was not going well.

[37] I have concluded Mr Revfiem did not intend to have a discussion about redundancy nor did he have a plan in mind when he convened the call on 20 April 2020.

[38] Standing back and considering and weighing all of the evidence, I am satisfied the consultation process lacked any semblance of procedural fairness. The failures by Civic were not minor and led to Ms Hayward being treated unfairly.

### **Remedies**

[39] Having established a personal grievance for unjustified dismissal I may award any of the remedies provided for under s 123 of the Act. In this regard Ms Hayward seeks reimbursement of nine months lost wages from the date of her dismissal to the date of the investigation meeting and compensation in the sum of \$35,000 for humiliation, loss of dignity and injury to feelings.

---

<sup>6</sup> *Stormont v Peddle Thorp Aitken Limited* [2017] NZEmpC 71 at [54]; [2017] ERNZ 352; (2017) 14 NZELR 789.

### ***Lost wages***

[40] Section 123(1)(b) of the Act provides for reimbursement by Civic of the whole or any part of wages lost by Ms Hayward as a result of her personal grievance. Section 128(2) of the Act provides for an order of the lesser of a sum equal to her lost remuneration, or to three month's ordinary time remuneration. I have a discretion under s 128(3) of the Act to order a greater sum reflecting the lack of earnings for a period longer than three months.

[41] I am satisfied Ms Hayward has lost remuneration attributable to her personal grievance. Ms Hayward is over 60 years old and has given comprehensive evidence of the steps she has taken to mitigate her loss. Despite numerous applications, Ms Hayward has failed to secure alternative employment.

[42] However, I am not minded to exercise my discretion to award a greater sum than the three months. This is because Ms Hayward's employment was subject to a probationary period of three months. Ms Hayward has acknowledged there were difficulties in the relationship and that is apparent from some of the communications between her and Mr Revfiem. Had Mr Revfiem decided, instead, to embark on a process to apply the probationary period of the employment agreement it is possible to conclude that Ms Hayward's employment may have ended by 5 May 2020.

[43] Further Ms Hayward told me she had anticipated being made redundant. I have concluded it is likely, although not certain, that had Civic embarked on a more thorough analysis and consultation process Ms Hayward would still have faced the prospect of her employment ending.

[44] Three month's pay is equivalent to \$30,000 gross. That is the sum Civic Limited is ordered to pay to Ms Hayward within 28 days of the date of this determination.

### **Compensation**

[45] Ms Hayward says the lack of consultation left her feeling minimised, devalued and distrusted. Ms Hayward's evidence is that she was excited to be offered a permanent role with Civic and enjoyed her work from which she derived great satisfaction.

[46] Following her dismissal Ms Hayward sought medical assistance and counselling to assist her. Ms Hayward's evidence of the impact the dismissal had on her was supported by other witnesses who described Ms Hayward as becoming withdrawn, highly emotional, distressed and tearful. All characteristics that had not been present before her dismissal.

[47] I consider the evidence warrants an award of compensation in the sum of \$25,000. When setting this sum I have been mindful of the need not to keep compensatory payments artificially low and have taken into account decisions from the Employment Court on compensation levels.<sup>7</sup>

[48] Civic Limited is ordered to pay to Ms Hayward the sum of \$25,000 under s 123(1)(c)(i) of the Act within 28 days of the date of this determination.

### **Contribution**

[49] Having found Ms Hayward is entitled to remedies for her personal grievance for unjustified dismissal, I am required by s 124 of the Act to consider whether she contributed to the situation giving rise to her grievance.

[50] It is apparent that Ms Hayward's behaviour was a contributing factor for Mr Revfiem when he initiated the telephone discussion on 20 April 2020. Civic says Ms Hayward's behaviour and her suggestion that she would make her redundant if she was him are both causative factors that should result in a reduction to remedies.

[51] I disagree with Civic's position on contribution. Ms Hayward should not be left to shoulder the blame for the deterioration of the relationship between her and Mr Revfiem. Ms Hayward has never had a proper opportunity to address any concerns held by Mr Revfiem and I agree with Ms Hayward that any reliance on these issues as contributing to the decision to make her redundant is not appropriate.

[52] The decision to proceed with redundancy was Mr Revfiem's decision alone. After Ms Hayward raised her concerns on 22 and 24 April 2020 Mr Revfiem had the opportunity to take a step back and reconsider his position. He failed to do that.

---

<sup>7</sup> *Waikato District Health Board v Archibald* [2017] NZEmpC 132, [2017] ERNZ 791; *Richora Group Ltd v Cheng* [2018] NZEmpC 113, [2018] ERNZ 337.

[53] I am satisfied there was no conduct by Ms Hayward that was blameworthy such that her remedies should be reduced.

**Application for penalties for breach of the employment agreement and good faith**

[54] Civic breached both the terms of the employment agreement and its statutory duty of good faith when it failed to properly consult and provide information to Ms Hayward.

[55] However, I am not satisfied that penalties for either breaches are warranted. The breaches though not minor, are adequately remedied by my finding that Ms Hayward has successfully established a personal grievance and the remedies detailed above.

**Costs**

[56] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Ms Hayward shall have seven days from the date of this determination in which to file and serve a memorandum on the matter. Civic shall have a further seven days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[57] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell  
Member of the Employment Relations Authority