

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 392
3112919

BETWEEN CATARINA JOHNSTON
Applicant

A N D SOUTHLAND ACCOUNTING
SERVICES LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Damien Pine and Jessica Hayes, counsel for the Applicant
Angela MacKenzie, counsel for the Respondent

Investigation Meeting: 18 May 2021

Submissions Received: Up until 27 August 2021 from the Applicant
Up until 1 September 2021 from the Respondent

Date of Determination: 7 September 2021

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Catarina Johnston worked for Southland Accounting Services Limited as a senior accountant from 18 July 2016. Ms Johnston’s employment with Southland Accounting came to an end on 24 March 2020 in a telephone call she had with Bruce Kennard, a director and shareholder of Southland Accounting and the manager of its accounting business.

[2] Ms Johnston says that Mr Kennard terminated her employment in that call, advising her that because of Covid-19 – the nationwide level 4 lockdown having been announced the day before - and because she was a part time employee, her employment was being terminated. This notice of termination was confirmed in writing in a letter dated 24 March 2020 which she received later that day.

[3] In contrast, Mr Kennard says Ms Johnston made it clear to him in that call that she was not going to attend work as requested as she was going to work in her partner's fruit and vegetable store. Southland Accounting does not suggest that Ms Johnston's advice to Mr Kennard was a resignation, rather it says her advice to Mr Kennard amounted to her abandoning her employment. Southland Accounting says as Ms Johnston had left work the day before to work at her partner's store it confirmed her finishing date, the date of abandonment, as being 23 March 2020.

[4] Ms Johnston also complains about Mr Kennard attending the Southland Accounting office on 20 March 2020 when he was self-isolating having just returned from a trip to Australia. Ms Johnston says that by Mr Kennard entering the Southland Accounting office, Southland Accounting failed to provide a safe work environment for her and her colleagues.

[5] Based on these events, Ms Johnston raised personal grievances for unjustified dismissal and unjustifiable action causing disadvantage. And, Ms Johnston subsequently lodged a statement of problem in the Authority with claims based on these two personal grievances and further claims based on allegations that Southland Accounting breached of the duty of good faith and breached her employment agreement.

[6] Southland Accounting responded to these claims denying any wrongdoing and claiming that in fact Ms Johnston had breached the duty of good faith she owed to it by abandoning her employment, seeking a penalty against Ms Johnston as a result.

[7] It is these claims that I investigated and this determination resolves.

Unjustified action causing disadvantage

[8] Section 103(1)(b) of the Employment Relations Act 2000 (the Act) sets out that an employee may have a personal grievance where the employee's employment or any condition of employment is or was affected to the employee's disadvantage by some unjustifiable action by their employer.

[9] Based on section 103(1)(b) of the Act, the questions to be addressed in respect of an unjustifiable action causing disadvantage personal grievance are:

- (a) What does the employee complain of in terms of the employer's actions and did the employer act as alleged?
- (b) If so, did the employer's actions cause any disadvantage to the employee's employment or a condition of employment?
- (c) If so, were the employer's actions justifiable?

What action does Ms Johnston complain of and did this happen?

[10] Ms Johnston says Mr Kennard attended the Southland Accounting office during a time when he was self-isolating and the effect of that was to place her and her colleagues at risk; she says, as a result, Southland Accounting's action is a failure to provide a safe workplace.

[11] Mr Kennard's obligation to self-isolate arose out of The New Zealand Government's Covid-19 order requiring all people arriving in New Zealand from any country to self-isolate from 16 March 2020. The Ministry of Health Covid-19 Border Advisory of 16 March 2020, outlined that the order meant people could return home from their port of arrival, including on domestic flights if necessary and then once home people should remain in self-isolation; self-isolation included avoiding situations where people could facilitate the transmission of Covid-19 such as social gatherings and events where they came into contact with others.

[12] On 20 March 2020, Mr Kennard was self-isolating, having recently returned from a trip to Australia. On this day, after normal business hours, Mr Kennard attended at the Southland Accounting office. Mr Kennard wore PPE gear, including a mask and gloves and he says he was careful about what surfaces he touched. Mr Kennard went to the office at 7:00 pm on Friday and was confident no one would be there. He also calculated that it would be at least 60 hours before any of Southland Accounting employees next went to the office on Monday morning.

[13] In these circumstances I am not satisfied that Mr Kennard's actions put him in a position where he would facilitate the transmission of Covid-19 nor were his actions such that the employees of Southland Accounting were at risk of contracting Covid-19.

[14] Southland Accounting did not act as alleged by Ms Johnston; it did not fail to provide a safe work environment.

[15] As a result of this conclusion I am not required to consider the other two questions relating to Ms Johnston's personal grievance for unjustifiable action causing disadvantage; Ms Johnston's claim based on an unjustifiable action causing disadvantage is dismissed because Southland Accounting did not act as alleged.

Unjustified dismissal

[16] In addition to working at Southland Accounting Ms Johnston owned a business with her partner, Raymond Kirby; a fruit and vegetable shop in Invercargill (the Shop).

[17] Ms Johnston worked at Southland Accounting Monday to Thursday and on Friday she worked at the Shop.

[18] In the course of my investigation meeting I heard evidence relating to allegations that Ms Johnston would often leave Southland Accounting, on days she was working, on short notice; or that Ms Johnston would not turn up for work, on days she was to work, again on short notice, so she could work at the Shop. I accept that this may have occurred occasionally, so for example Ms Johnston taking a day of annual leave, on relatively short notice, so she could work at the Shop. But I do not accept that she simply walked out of Southland Accounting when she should have been working, to work at the Shop. I find that Ms Johnston did, very occasionally, take annual leave to work at the Shop and perhaps on one or two occasions this occurred with short notice; but this was not raised as an issue with Ms Johnston and she never did this in circumstances that left Southland Accounting in a difficult work situation.

[19] Ms Johnston was at work on 23 March 2020 when the nationwide level 4 lockdown was announced. There was some discussion at work, including with Mr Kennard by telephone, as he was still self-isolating at that time, about what would happen in terms of continued work from home for the Southland Accounting employees.

[20] Late in afternoon, Ms Johnston was still at Southland Accounting when Mr Kirby called her and asked her to come down to the Shop to help out as it was overrun with customers wanting to stock up before the lockdown took effect.

[21] Ms Johnston spoke to a colleague and explained the situation and then left to go to the Shop.

[22] The next morning at 6:22 am Ms Johnston sent an email to Mr Kennard which stated:

During these difficult times and particularly over the next two days until lockdown I feel my time is best spent helping our community by being at the veggie shop until lockdown takes effect.

This will alleviate pressure for yourself and enable you to continue to formulate your plan for us the team at Southland Accounting to work from home. This morning I will leave my laptop at he (sic) office for any work you feel Andy needs to do to enable me to work from home Thursday morning on. I will pick it up and any folders necessary from the office on Wednesday night.

As I have 4 days annual leave owing please treat these coming two days as annual leave. I am available by email, text or phone if you need to contact me at any time regarding my continuation of working from home.

[23] Ms Johnston then went to work at the Shop.

[24] Later that morning Ms Johnston noticed she had a missed call; when she called the number back it was answered by Mr Kennard. What was discussed in that telephone call is disputed:

(a) Ms Johnston says Mr Kennard told her he was terminating her employment, and that he had made that decision after considering the work available for the two full time accountants and her as a part time accountant. Ms Johnston was shocked and put the call on speaker phone so Mr Kirby, who was with her at the Shop could hear it; Ms Johnston told Mr Kennard he was on speaker phone and asked him to repeat what he had told her. Mr Kennard than repeated to her and Mr Kirby that he was terminating Ms Johnston's employment.

(b) Mr Kennard says he did not terminate Ms Johnston's employment, rather he called her to tell her to come to the office to help prepare for working from home during the level 4 lockdown. He says, when he told Ms Johnston this she said

she was not coming into the office as she was too busy at the Shop, there was no way she was going to the office and she was staying at the Shop. Mr Kennard says that as it was clear to him that Ms Johnston had no intention of coming back to work at Southland Accounting at all. Because of this he told her, he would “finish her” and then because she had left the day before he said he may as well “do it as of yesterday”.

[25] Ms Johnston asked for Mr Kennard to confirm what was happening in writing and later that day Southland Accounting sent her a letter dated 24 March 2020, which stated:

As per our discussion today. I can report on the following.

Thank you for your email re your work commitment for the next two days.

Yesterday I looked and considered the future of Southland Accounting Service Ltd (SAS) under the new restrictions re Covid 19 and made decisions on SAS’s future re working from home.

Based on that decision I made the decision to terminate your employment as of Monday 23 March 2020.

[26] Ms Johnston did not return to work at Southland Accounting after the 24 March 2020 telephone call.

Dismissal

[27] The first issue for Ms Johnston’s unjustified dismissal personal grievance claims is did Southland Accounting dismiss her?

[28] The onus of proving a dismissal in this case rests with Ms Johnston.

[29] Dismissal is the termination of employment at the initiative of the employer. It is an unequivocal act, which amounts to a sending away.¹

[30] The question in this case is did Mr Kennard dismiss Ms Johnston by making a statement in the telephone call on 24 March 2020 which amounted to a sending away.

¹ *Wellington Clerical Union v Greenwich* [1983] ACJ 965 (AC).

[31] As I have indicated the evidence as to what was said in the telephone call on 24 March 2020 is disputed. When faced with conflicting evidence I must decide which evidence I prefer based on an assessment of credibility. As I have done in the past when assessing credibility, I have relied on the guidance provided by Judge Harding in the District Court in *R v Biddle* that was cited with approval on appeal to the High Court.² And the guidance from the Employment Court in *Lawson v New Zealand Transport Agency* and *Cornish Truck & Van Limited v Gildenhuis*.³

[32] Overall I come to the conclusion that I prefer evidence from Ms Johnston:

- (a) Her evidence was consistent throughout, not only in terms of her own written and oral evidence but consistent with Mr Kirby's evidence.
- (b) Her evidence was consistent with and supported by the letter from Southland Accounting of 24 March 2020.
- (c) Her evidence was also consistent with her own written account of events set out in her personal grievance letter of 8 April 2020 and then Southland Accounting's response to the personal grievance dated 30 April 2020, where it labelled the letter of 24 March 2020 the "Termination Notice" and referred to the decision "made to terminate your part time employment ...".
- (d) She appeared reliable and was accurate in her recall of events, yet made appropriate concessions when she was unsure.
- (e) Her account of what occurred is more plausible than Southland Accounting and makes more sense. Southland Accounting's version of what occurred is premised on the basis that Ms Johnston did not want to continue to work for Southland Accounting, hence she was abandoning her job, and choosing to work in the Shop. But this is inconsistent with the email Ms Johnston sent that

² *R v Biddle* [2015] NZDC 8992; and *Biddle v R* [2015] NZHC 2673 at [21].

³ *Lawson v New Zealand Transport Agency* [2016] NZEmpC 165; and *Cornish Truck & Van Limited v Gildenhuis* [2019] NZEmpC 6.

morning and her understanding of what she would be able to do during the level 4 lockdown in terms of working at the Shop.

[33] I am satisfied that in the call on 24 March 2020 Mr Kennard told Ms Johnston he was terminating her employment and this was based on his assessment of the work required for the full time accountants and there, presumably, being insufficient work left for her as a part time accountant.

[34] Mr Kennard's statement to Ms Johnston, in these terms, was an unequivocal sending away. I will add here that even on Mr Kennard's evidence, if I had preferred that, his statement that he would "finish her" as of the day before would also have been a sending away. If Mr Kennard had said that then the effect was, he was saying Ms Johnston's employment was over – finished - albeit because Ms Johnston had refused to come to work.

Conclusion on dismissal

[35] In all of the circumstances, I conclude that Southland Accounting did terminate Ms Johnston's employment on 24 March 2020, in the call Mr Kennard had with Ms Johnston and then it confirmed that dismissal in writing later that day.

Was Ms Johnston's dismissal justified?

[36] The next question is, was Southland Accounting's dismissal of Ms Johnston justified?

[37] Justification is assessed in two parts. First, whether the employer carried out a fair process in coming to the decision to dismiss and second, whether the decision to dismiss was substantively justified.

[38] In terms of process, a fair process is governed by s 4(1A) and s 103A of the Act. Based on these sections, in order to carry out a fair process when dismissing Ms Johnston, Southland Accounting needed to:

- (a) Properly investigate the concerns it had regarding work during lockdown and what it might require from its employees;

- (b) Clearly outline its concerns regarding this to Ms Johnston for her to respond to them;
- (c) Then give Ms Johnston a reasonable opportunity to respond to the information and the concerns before it made its decision to dismiss; and
- (d) Finally, consider any explanations given by Ms Johnston before it decided to dismiss her.

[39] It is obvious from my findings of what occurred in the telephone call of 24 March 2020 that Southland Accounting did not carry out a fair process. It also follows that as the process was so flawed there was no basis to decide that dismissal was appropriate.

[40] Therefore, dismissal was unjustified both from a procedural and substantive point.

Remedies

[41] As Ms Johnston was unjustifiably dismissed I may award any of the remedies provided for under s 123 of the Act; Ms Johnston seeks compensation and reimbursement.

Compensation

[42] Turning to compensation, this is an award for the humiliation, loss of dignity and injury to feelings that an applicant suffers and is made pursuant to s 123(1)(c)(i) of the Act.

[43] My task is to quantify the harm and loss caused by the humiliation, loss of dignity and injury to feelings. In doing this I must consider the effects of the dismissal on an employee, identifying the harm caused to them and the loss they suffered as a result. Then I must quantify that harm and loss by assessing where that sits on the spectrum of harm and loss suffered by those that have been unjustifiably dismissed and where that corresponds to the spectrum of quantum awarded as compensation.⁴

⁴ *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71; *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132; and *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

[44] Based on Ms Johnston and Mr Kirby's evidence I am satisfied that as a result of being dismissed by Southland Accounting Ms Johnston suffered the following:

- (a) Ms Johnston was devastated and shocked by the decision and the manner in which she was told.
- (b) She was embarrassed and humiliated by the way she was treated, not just in the way Mr Kennard dealt with her but also in relation to her colleagues and not being able to discuss what occurred and say goodbye to them. And then also not being able to tell clients about what occurred and why she was no longer at Southland Accounting.
- (c) Her embarrassment and humiliation was exacerbated by people becoming aware of what occurred and having to deal with questions and rumours.
- (d) She has lost confidence in her abilities, becoming anxious, defensive and then aggressive over day to day matters; this has had a large impact on her relationships with friends and family.
- (e) Her level of distress and emotional harm is such that she has been undertaking regular counselling to deal with the impact on her.

[45] Based on this harm and loss I assess the level of compensation to be \$18,000.00.

Reimbursement

[46] Ms Johnston also seeks reimbursement for the earnings she has lost as a result of her unjustified dismissal pursuant to s 123(1)(b) of the Act. She also seeks payment for two weeks' notice which was not paid by Southland Accounting.

[47] As I am satisfied that Ms Johnston has a personal grievance and she has lost remuneration as a result, then pursuant to s 128 of the Act my starting point is to award Ms Johnston at least the lesser of her lost remuneration or three months ordinary time remuneration.

[48] I have calculated Ms Johnston's actual loss over a period of 12 months based on her Inland Revenue income statements for the two financial years as the termination date is only 1 April 2019 – 31 March 2020 (which covers the period she was employed by Southland Accounting and also includes the part time work she did at the Shop) and 1 April 2020 – 31 March 2021 (excluding the holiday pay she received in this period from Southland Accounting). These financial year periods are respectively, sufficiently close to the termination date and the date of the investigation meeting that they are, in my view an accurate basis to measure the actual loss.

[49] Based on this I calculate Ms Johnston's actual loss to be \$16,792.00. I note at this point that I have included payment for two weeks' notice not paid by Southland Accounting, in this calculation.

[50] Using the income statement for the financial year 1 April 2019 – 31 March 2020 I calculate 13 weeks ordinary time remuneration to be \$13,357.00. This does not include two weeks' notice pay.

[51] Clearly three months ordinary time remuneration is the lesser amount and this is my starting point. If I award just this amount I will also award, separately the two weeks' notice pay.

[52] As Ms Johnston's actual loss is greater than the three month remuneration starting point, I can exercise my discretion to award more up to this full loss under s 128(3) of the Act.

[53] The exercise of the discretion under s 128(3) was considered by the Court of Appeal in *Sam's Fukuyama Food Services Ltd v Zhang*, where the Court concluded there is no automatic entitlement to full loss and set out the factors to consider in exercising the discretion to award an amount up to that full loss.⁵

[54] Based on *Zhang*, I must decide whether I should exercise my discretion to award more than three months ordinary time remuneration and if so how much more, up to the actual loss. In doing this I should recognise that moderation is appropriate, my assessment should be individualised to the circumstances of the case and I must allow for any contingencies that

⁵ *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608.

might have resulted in termination of the employee's employment such that they would not have earned the total amount of the claimed loss.

[55] Applying *Zhang*, I am satisfied that I should exercise my discretion to award Ms Johnston her full loss. So, I award Ms Johnston \$16,792.00 (gross) for lost remuneration pursuant to s 123(1)(b) and s 128 of the Act.

Contribution

[56] As I have awarded remedies to Ms Johnston, I must now consider whether she contributed to the situation that gave rise to her dismissal and if so whether I should reduce the remedies I have awarded to her.⁶ This assessment requires me to determine if Ms Johnston behaved in a manner that was culpable or blameworthy, and this behaviour contributed to her grievances.⁷

[57] I have reflected on what occurred to Ms Johnston and how she acted and I find that Ms Jamieson did not act in a blameworthy or culpable manner; there was no contributory behaviour from Ms Jamieson requiring a reduction in the remedies she has been awarded.

Breach of good faith and breach of Ms Johnston's employment agreement

[58] In failing to meet the standard required for carrying out a fair process in dismissing Ms Johnston, Southland Accounting also failed to meet the duty of good faith set out in s 4 of the Act. I am also satisfied that Southland Accounting has breached Ms Johnston's employment agreement.

[59] As a result Southland Accounting is liable to a penalty if I am satisfied that the failure was deliberate, serious and sustained or the failure was intended to undermine the employment relationship.⁸ Where there has been a blatant failure to follow a fair process and provide an employee an opportunity to be involved, through consultation, in a decision to dismiss, I am satisfied that a penalty is appropriate. Further, following the Employment Court decision in

⁶ Section 124 of the Employment Relations Act 2000.

⁷ *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136.

⁸ Section 4(1A) of the Employment Relations Act 2000.

Madigan v Director General of Conservation I am satisfied that a penalty should be imposed.

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[60] Assessing the scope of the breach and the nature of the actions as well as the impact on Ms Johnston, I assess the penalty to be \$6,000.00 and consider it appropriate that 75% of that be paid to Ms Johnston.¹⁰

Breach of good faith by Ms Johnston

[61] Based on my findings in relation to Southland Accounting's actions in dismissing Ms Johnston, it follows that I am satisfied that Ms Johnston was not at fault in her dismissal and, in particular did not abandon her employment. Ms Johnston did not breach the duty of good faith she owed to Southland Accounting and there is no basis to impose a penalty against her.

Outcome

[62] Southland Accounting Services Limited unjustifiably dismissed Ms Johnston. In satisfaction of this personal grievance it must pay Ms Johnston:

- (a) \$18,000.00, without any deduction, for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.
- (b) \$16,792.00 (gross) for reimbursement pursuant to s 123(1)(b) and s 128 of the Employment Relations Act 2000.

[63] Within 28 days of the date of this determination, Southland Accounting Services Limited must pay Ms Johnston the sum of \$4,500.00 as part payment of the penalty imposed.

[64] Within 28 days of the date of this determination, Southland Accounting Services Limited must pay to the Authority for transfer to a Crown Bank account the balance of the penalty imposed being \$1,500.00.

⁹ *Maddigan v Director-General of Conservation*, [2019] NZEmpC 67.

¹⁰ Applying s 133A of the Employment Relations Act 2000 and *Maddigan v Director-General of Conservation*, above n7 at [55].

Costs

[65] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[66] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 14 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority