

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 206
5535138

BETWEEN

ROZALIND JONES
Applicant

A N D

PALMCO GARDEN LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Belinda Robinson, Advocate for the Applicant
David Harrison, Accountant for the Respondent

Investigation Meeting: 13 July 2015 at Kerikeri

Determination: 14 July 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ms Rozalind Jones was employed by Palmco Garden Limited (Palmco) from 17 March 2014 until she was made redundant on 24 November 2014.

[2] Palmco is a garden centre which specialises in the sale of palms which it grows on site. It also runs a gift shop and café. Ms Jones was employed under an individual employment agreement which described her position as Gardener and Shop Assistant. Ms Jones also worked in the café and participated in marketing activities for Palmco.

[3] Dr Kristin Lammerting is the sole director and shareholder of Palmco. Ms Jones and Dr Lammerting considered each other to be friends but Ms Jones says their relationship deteriorated when Mr Mike Wright was employed as Site Manager on 01 September 2014.

[4] Mr Wright was employed to work 40 hours per week plus overtime as directed. He was paid \$30 per hour. He was responsible for digging out palms which were onsite. Ms Jones had agreed to help Mr Wright with digging out the palms as health and safety required it to be a two person job.

[5] On 26 September 2014 Ms Jones fell into a hole at work and broke her ankle. She was off work on ACC until 24 November 2014. When she returned to work that day Mr Wright handed Ms Jones a letter dismissing her for redundancy.

[6] On 29 September Palmco interviewed Ms Wendy Laurenson and offered her part time work. Ms Laurenson was employed to work six hours a day on Mondays, Tuesdays and Wednesdays. Ms Laurenson was made redundant in April 2015.

[7] On 8 October 2014 Dr Lammerting visited Ms Jones at her home. This was an unannounced visit so Ms Jones thought it was purely a social visit to see how her leg was mending. Ms Jones says she was shocked because Dr Lammerting told her that a decision had been made to make her (Ms Jones) redundant and that she would have been told that on the afternoon of 26 September had she not had her accident.

[8] Ms Jones alleges that Dr Lammerting told her that nobody at Palmco liked working with her or wanted her to remain at Palmco. Ms Jones says Dr Lammerting returned all of her (Ms Jones') personal property which she had been keeping at work. Ms Jones was not told that Ms Wendy Laurenson had just been employed and had started work on 06 October 2014.

[9] Ms Jones says that the meeting ended with Dr Lammerting telling her that once Ms Jones' plaster cast was removed she would be given two weeks' notice of redundancy and that if she did not cause any "*drama*" she would be given \$2,400. Ms Jones says she was very shocked and distressed and asked Dr Lammerting to leave her home.

[10] Ms Jones sent Dr Lammerting a number of emails trying to clarify her employment status and advising she had been cleared to return to work so would be back at work on 24 November. None of these emails were responded to which Ms Jones says left her in a state of confusion.

[11] Ms Jones says that when she turned up to work on 24 November she was given a letter advising that her employment would terminate on 05 December 2014.

However Ms Jones' employment actually terminated that day because she was paid in lieu of notice so did not actually work again after her accident on 26 September.

[12] Ms Jones claims her dismissal is substantively and procedurally unjustified. She also claims that Palmco breached its good faith obligations to her.

[13] Palmco says that Ms Jones' redundancy was justified. It says that the only business being conducted physically by the Palmco apart from the selling palms was the running of its shop. It had contracted the running of its café out. The shop was staffed by Ms Suzie Pavey who worked six hours a day on Thursdays, Fridays, Saturdays and Sundays whilst Ms Laurenson worked Mondays – Wednesdays. Ms Pavey was paid \$22 per hour and Ms Laurenson was paid \$20 per hour.

[14] Mr Harrison says that he advised Dr Lammerting for a number of months that Palmco could not afford its staff costs. Palmco says that Ms Jones was made redundant based on advice from Mr Harrison that it was facing continued losses and had a lack of working capital.

[15] Mr Harrison says that Dr Lammerting had made the decision to make Ms Jones redundant around the time of her accident, but kept Ms Jones on the payroll while she was on ACC because they were friends. Dr Lammerting had intended to give Ms Jones notice of redundancy on the day of Ms Jones' accident, but that did not occur because of the accident.

Issues

[16] The following issues are to be determined:

- a. Was Ms Jones' dismissal justified?
- b. If not, what if any remedies should be awarded?
- c. Is Ms Jones owed wage arrears?
- d. What if any costs should be awarded?

Was Ms Jones' dismissal justified?

[17] The Authority must objectively assess whether Palmco's actions, and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time that Ms Jones was made redundant.¹

[18] In assessing justification the Authority must consider the four procedural fairness tests in s.103A(3) of the Act and compliance with s.4(1A) good faith obligations in the Act. It may also consider other appropriate factors under s.103A(4) of the Act.

Good faith

[19] Section 4(1A) of the Act requires an employer who is proposing to make a decision that may adversely impact on an employee's ongoing employment to provide that employee with relevant information and an opportunity to comment on it before a final decision about the employee's ongoing employment is made.

[20] I find that Palmco did not comply with its good faith requirements under s.4(1A) of the Act. It did not provide Ms Jones with any information relevant to the proposed restructuring of her position before she was made redundant. She was therefore deprived an opportunity to comment on information relevant to her ongoing employment before she was dismissed.

[21] I consider this fundamentally undermines Palmco's ability to justify Ms Jones' redundancy dismissal.

Procedural fairness

[22] I find that Palmco did not comply with any of the four procedural fairness tests in s.103A(3) of the Act. Ms Jones was simply presented with a letter terminating her employment. Her dismissal was a fait accompli. There was no consultation. There was no explanation of why a restructuring was necessary or why Ms Jones had been selected for redundancy. Nor was there any explanation as to why Mr Wright and Ms Laurenson had been taken on as new employees if Ms Jones' redundancy was intended to save staffing costs.

¹ Section 103A(2) of the Employment Relations Act 2000 (the Act)

[23] A fair and reasonable employer is expected to comply with its statutory obligations. That did not occur in this case. I find that Palmco's failure to comply with any of the four procedural fairness tests in s.103A(3) of the Act fundamentally undermines its ability to justify Ms Jones' dismissal.

Substantive justification

[24] I find that Palmco's failure to comply with its good faith obligations or with basic procedural fairness requirements fundamentally undermines its ability to substantively justify Ms Jones' redundancy dismissal. Because Ms Jones had no opportunity to engage in the restructuring process, I am unable to conclude with sufficient certainty that her redundancy was a forgone conclusion.

[25] I am concerned that Palmco employed Mr Wright a few weeks before deciding to make Ms Jones redundant. Mr Wright was employed in circumstances where Palmco's accountant was advising that Palmco could not afford its staffing costs. Palmco did not present any analysis as to what Ms Wright's employment would mean for other employees such as Ms Jones.

[26] I consider that Mr Wright's employment to work more hours than Ms Jones at a higher hourly rate than Ms Jones undermines Palmco's ability to justify Ms Jones' redundancy.

[27] It is also concerning that Ms Laurenson was employed for 18 hours per week immediately after the decision to make Ms Jones redundant had been made.² Ms Wright remained employed until April 2015 while Ms Jones was made redundant on 24 November 2014.

[28] I find that Palmco did not use a fair or proper selection process. There appears to have been no selection process as Ms Jones was the only person considered for redundancy.

[29] Mr Harrison told the Authority that Ms Jones was made redundant because Ms Pavey did not get on with her. These issues had never been raised with Ms Jones so were improperly considered. Ms Jones was never advised that Ms Pavey's views

² Dr Lammerting and Mr Harrison say the decision to make Ms Jones redundant was made before 26 September and was going to be communicated to Ms Jones that afternoon. Ms Wright was interviewed on 29 September and started work on 08 October 2014.

about her were adversely impacting on her ongoing employment so Ms Jones had no chance to address them.

[30] It is also curious that Palmco elected to keep Ms Pavey employed when she could only work in the shop and was paid more than Ms Jones. Ms Jones had a much wider skill set and expertise and was more versatile in terms of the work she was able to perform for Palmco.

[31] Mr Harrison suggested that Ms Jones did not know how to run the shop but I do not accept that evidence. Ms Jones ran the shop without incident for six weeks while Ms Pavey was overseas. Ms Jones had also worked in the shop for a number of months before her redundancy. There was no evidence that she could not have been trained to do the administrative functions Ms Pavey undertook if Ms Pavey was made redundant.

[32] I find that Ms Jones' redundancy was substantively unjustified because her selection was unfair. It appears that Ms Jones was targeted for redundancy because Ms Pavey apparently did not like working with her. Improper factors (such as Ms Pavey's adverse views about Ms Jones) were taken into account and relevant factors (such as Ms Jones' versatility, expertise and experience) were not appropriately considered.

[33] I do not consider it a foregone conclusion that even if a fair and proper process been followed Ms Jones would still have been made redundant. I therefore find that Palmco's dismissal of Ms Jones was substantively unjustified.

What if any remedies should be awarded?

Mitigation of loss

[34] Ms Jones' work visa was only valid for her employment in the specified position with Palmco. The visa allows Ms Jones to work as head gardener/retail display/sales and marketing assistance for Palmco Gardens Limited in Kerikeri. Although Ms Jones tried to get permanent employment with other employers she did not succeed because of her visa restrictions.

[35] Ms Jones says she although she applied for other jobs potential employers decided against employing her when they discovered she had to change her work visa.

A visa change required the new employer to satisfy Immigration New Zealand that no-one locally could do the job she was being offered which is a high test to meet.

[36] Ms Jones did obtain a few weeks' casual work as a waitress/kitchen hand for Ake Ake Restaurant from 30 November to 19 December 2014.

[37] Ms Jones left New Zealand on 07 February 2015 and now resides in England. Ms Jones says she was not eligible for government assistance and could not afford to remain in New Zealand without an income. Although Ms Jones returned to England on 07 February 2015 I find this does not break the chain of causation because she had no option but to leave because of her visa and financial status which were a direct result of her unjustified dismissal.

[38] I am satisfied that in the circumstances Ms Jones took adequate steps to mitigate her loss.

Lost remuneration

[39] Ms Jones claims \$54,000 being 73 weeks' lost remuneration which is the amount of time she had left on her work visa with Palmco.

[40] I have calculated lost remuneration at \$750 per week (being 37.5 hours per week @ \$20 per hour). I award Ms Jones 21 weeks' lost remuneration for the period 05 December 2014 to 03 April 2015. Palmco was in financial difficulty and made Ms Laurenson redundant in April 2015 so even if Ms Jones had not been made redundant in November 2014 I am not satisfied her employment would have continued past 03 April 2015.

[41] Palmco is ordered to pay Ms Jones \$14,655 lost remuneration under s.123(1)(b) of the Act (being \$15,750 (20 weeks @ \$750) less \$915 (being amount earned since dismissal)).

Distress compensation

[42] Ms Jones considered that she was friends with Dr Lammerting so was very distressed by her dismissal. Ms Jones was new to the community, having only been in New Zealand for eight months. Ms Jones says that lack of a support system made it very difficult for her without an income.

[43] The fact that her work visa was linked to Palmco and the absence of money to fund changing that to a new employer put Ms Jones in a very challenging situation. She had also just become pregnant but was not entitled to medical care in New Zealand due to her visa status.

[44] Ms Jones says that she had decided to pursue her dream to live in New Zealand and to work outdoors which is also her passion. She was devastated that she lost her job and with the adverse consequences that had on her. Ms Jones' inability to change her visa meant she could not earn money which meant she was not allowed to stay in New Zealand without a job so had to return to England.

[45] The requirement to return to England meant Ms Jones had to leave the father of her baby. He did not attend the birth of her newborn baby due to insufficient funds to travel to England. Ms Jones is now bringing up her baby with its father on the other side of the world.

[46] Ms Jones told the Authority she is finding it extremely difficult being back in England as she had chosen to live in New Zealand and feels that choice has been unilaterally taken away from her by Palmco's actions.

[47] Ms Jones has suffered emotionally and financially. Ms Jones sought medical treatment as a result of her dismissal. She is also still paying-off her airfare which she had to put on a Visa card in order to be able to return to England.

[48] Palmco is ordered to pay Ms Jones \$6,000 under s.123(1)(c)(i) of the Act to compensate her for the humiliation, loss of dignity and injury to feelings she has suffered as a result of her unjustified dismissal.

Contribution

[49] Having determined that Ms Jones has a dismissal grievance s.124 of the Act requires me to assess whether remedies should be reduced on the grounds of contribution. Contribution denotes blameworthy conduct which must be proved on the balance of probabilities. The minimal evidence that was presented about alleged relationship difficulties with Ms Pavey did not reach that standard so I find that contribution has not been established. Accordingly, Ms Jones' remedies are not to be reduced.

Is Ms Jones owed wage arrears?

[50] Ms Jones did not raise a wage arrears claim in her Statement of Problem although she suggested she may not have been paid correctly. Ms Jones was required to provide evidence to support such a contention and I find she failed to do so. Accordingly, the available evidence does not establish to the required standard that Ms Jones was not paid her full wages by Palmco whilst employed.

Costs

[51] Ms Robinson says that Ms Jones has actually incurred legal costs. If that is correct then (subject to proof that legal costs have actually been incurred) Ms Jones as the successful party is entitled to a contribution towards her actual legal costs.

[52] The Authority will adopt its usual notional daily tariff based approach to costs. Parties are invited to identify any factors which they say should result in adjustments to the notional daily tariff which is currently \$3,500.

[53] Ms Jones is to file her costs submissions (together with proof of her actual costs) by 22 July. Palmco is to file its costs submissions by 30 July. This timetable may only be departed from with the prior leave of the Authority.

Outcome

[54] Palmco's redundancy dismissal of Ms Jones was substantively and procedurally unjustified.

[55] Within 28 days of the date of this determination Palmco is ordered to pay Ms Jones;

- (a) \$14,655 lost remuneration;
- (b) \$6,000 distress compensation.

Rachel Larmer
Member of the Employment Relations Authority