

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 172
5547834

BETWEEN

NAOMI KEENE
Applicant

A N D

LINK TECHNOLOGIES
COMPANY LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Applicant in person
No appearance by or for Respondent

Investigation Meeting: 2 June 2016 at Auckland

Date of Determination: 2 June 2016

ORAL DETERMINATION OF THE AUTHORITY

Non-appearance of respondent

[1] Link Technologies Company Limited (Link) failed to file a statement in reply to the statement of problem and also failed to attend the investigation meeting today.

[2] I am satisfied that Link was properly served with the statement of problem and subsequent correspondence from the Employment Relations Authority together with a notice of the investigation meeting.

[3] Mr Taro Matsuno, the sole director of Link, emailed the Authority and informed it that he will not be participating because Link was no longer trading and was to be struck off. A check of the Companies Office Register today confirms the company has not been struck off and appears to be trading.

[4] Being satisfied that Link was properly served with the proceedings and notice of investigation meeting, I proceeded to investigate the employment relationship problem of the applicant, Mrs Naomi Keene, in the absence of Link.

The investigation meeting

[5] Mrs Keene and her husband, Mr Malcolm Keene, both filed witness statements prior to the investigation meeting. Both Mr and Mrs Keene confirmed by way of affirmation that their evidence was true and correct.

[6] To assist the Authority, an interpreter proficient in the Japanese language attended the investigation meeting.

[7] As allowed under s.174 of the Employment Relations Act 2000 (the Act), this determination does not set out all of the evidence; relevant facts and legal issues are set out along with the Authority's conclusions.

Employment relationship problem

[8] Mrs Keene was employed by Link as a proof reader from 14 January 2013 until her dismissal on 20 February 2015 allegedly on the grounds of redundancy.

[9] Link is a Japanese translation service. Mr Taro Matsuno is the sole director and shareholder of Link, a company incorporated by him on 29 May 2012.

[10] Mrs Keene says her dismissal with effect from 20 February 2015 for redundancy was unjustified. Mrs Keene says Link was doing well, growing its business and at no stage before her dismissal was she informed otherwise.

[11] Mrs Keene says she was shocked and felt betrayed by the dismissal. Mrs Keene seeks remedies including compensation for the distress she suffered.

[12] Mrs Keene sought to have her grievance resolved by way of mediation and a mediation was held but was unsuccessful.

The issues

[13] The key issues for the Authority to determine are:

- (a) Was Mrs Keene's dismissal for redundancy justified;

- (b) If the dismissal was not justified, what remedies is she entitled to;
- (c) Does s.124 of the Employment Relations Act 2000 (the Act) apply? That is, was there any contributory conduct by Mrs Keene in respect of her dismissal for which remedies awarded should be reduced?;
- (d) Costs?

First Issue

Was Mrs Keene's dismissal for redundancy justified?

Employment by Link

[14] One of Mr and Mrs Keene's daughters attended the same primary school in Browns Bay as Mr and Mrs Matsuno's daughter. Mr and Mrs Keene's daughter, who was older than Mr and Mrs Matsuno's daughter, took the latter's daughter "under her wing" at school.

[15] The Matsunos and the Keenes became friends and socialised together. On 29 November 2012, Mr and Mrs Keene met with Mr Matsuno to discuss the prospect of providing Link with proof reading services, mainly proof reading patent translations. Mr and Mrs Keene were informed by Mr Matsuno that he had clients with large patent offices in Japan and that he expected his business to grow in New Zealand.

[16] Mr Matsuno informed the Keenes that he had a longterm business visa and was applying for permanent residency in New Zealand. Mr Matsuno informed the Keenes that he needed to employ a New Zealand citizen or permanent resident to assist in his application. However, the Keenes understood that Link was growing its business and their services as proof readers was required.

[17] On 3 December 2012, Mr Matsuno emailed Mr Keene a proposal in respect of a proof reading position with Link for Mrs Keene. The start date proposed was for mid January 2013, 30 hours a week at \$15 an hour.

[18] On 14 January 2013, Mrs Keene was employed by Link as a proof reader. Mrs Keene was provided with a written employment agreement which set out her hours being 30 hours a week from Monday to Friday between the hours of 9am and

4pm. Mrs Keene's hourly rate was \$15 which was to be paid fortnightly into her bank account.

[19] Clause 9 of the employment agreement provided that Link could terminate the agreement for cause by providing Mrs Keene 30 days' notice in writing. Clause 10 provided a procedure for resolving disputes which involved seeking assistance from the Department of Labour's Mediation Service, now the Ministry of Business, Innovation and Employment (MBIE).

[20] The employment relationship between Link and Mrs Keene worked well and on 31 January 2014, after more than a year of employment, Mrs Keene and Mr Matsuno met. At that meeting, Mr Matsuno explained to Mrs Keene that Link's business was doing well and she was shown a copy of the business accounts. Mrs Keene was further encouraged by an email received by her on 6 August 2014 from Mr Matsuno stating that Link's relationship with its clients was good. Mrs Keene understood that her performance and Link's business were both doing well.

Mr Matsuno's permanent residency visa

[21] On 5 December 2014, Mr Matsuno informed Mrs Keene by email that he had received news from his lawyer that he had obtained his permanent resident visa.

[22] On 18 December 2014, Mrs Keene received an email from Mr Matsuno informing her that he had obtained a permanent resident stamp in his passport that same day. At 3.33pm on the same day, Mr Matsuno informed Mrs Keene by email that he proposed finishing the employment contract.

[23] The email stated that the business conditions of Link were severe in 2014 and "*...I might not have told you before that it was quite severe in the previous term (2013).*" The email concluded by stating that Mr Matsuno wished the employment to end on 14 January 2015 with salary paid until 30 January 2015.

[24] Mrs Keene says she was shocked by the email and felt that she had been used by Mr Matsuno to assist him in obtaining permanent residence in New Zealand.

[25] Mrs Keene says that at no stage prior to December 2014 was she informed that the company was not performing, in fact she had been told quite the reverse.

[26] Mr and Mrs Keene met with Mr Matsuno on 2 occasions after the email of 18 December 2014 to discuss matters. Mr Matsuno provided some accounts to Mrs Keene but the information contained in them did not seem to suggest a severe financial situation for Link.

[27] Mrs Keene was dismissed on 20 January 2015 with effect from 20 February 2015.

Mrs Keene's attempts to find other employment

[28] Mrs Keene was very upset and felt betrayed by Mr Matsuno. Mr Keene says Mrs Keene was distressed and down at home after her dismissal.

[29] Mrs Keene applied unsuccessfully for 2 positions and then decided to undertake further study and look after her 3 children.

The law

[30] The Court of Appeal's statement of law regarding the genuineness of a redundancy in *GN Hale & Son Ltd v. Wellington Caretakers IUOW*¹, was that:

An employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, reorganisation or other cost-saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have a right to continued employment if the business can be run more efficiently without him.

[31] However, since *Hale* was decided, the test for justification for dismissal is now as stated in s.103A of the Act. Under this test, the question of whether Link's decision to dismiss Mrs Keene for economic reasons was justifiable must be determined, on an objective basis, by considering whether Link's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[32] In applying s.103A, the Authority must also consider four particular factors set out in s.103A(3) as well as any others it thinks appropriate. The four particular factors relate primarily to the way in which the employee concerned has been properly notified of issues and in this case issues relating to the viability of Link. Whether the

¹ [1991] 1 NZLR 151

employee was given a proper opportunity to respond to the concerns and whether the employer has genuinely considered the employee's responses.

[33] The test in s.103A is to be applied with the proviso that a dismissal must not be determined to be unjustifiable solely because of process defects if they were minor and did not result in the employee being treated unfairly².

[34] Mr Matsuno met with Mrs Keene on 15 January 2015 to discuss Link's fortunes. Prior to that date, Mrs Keene did not have any warning that Link's business was not doing well. Mrs Keene understood from her meetings with Mr Matsuno that the business was commercially viable and was growing. It was not until the meetings of 15 and 20 January 2015 that Mr Matsuno informed Mrs Keene that the business was in financial difficulty.

[35] Mr and Mrs Keene became concerned and raised with Mr Matsuno that it was their view that because he had obtained permanent residence in New Zealand that he no longer needed them and that was the real motive for the dismissal.

[36] Mr Matsuno did not respond to the statement of problem nor did he file any witness statements in response to those provided by Mr and Mrs Keene. I accept the evidence from Mr and Mrs Keene that there was never any suggestion that Link's business was in difficulty and it was coincidentally on the same date that Mr Matsuno obtained his permanent resident visa that he determined he no longer needed Mrs Keene and dismissed her employment for redundancy.

[37] Mrs Keene provided emails to the Authority from Mr Matsuno confirming how satisfied he was with her and Mr Keene's work for Link. Mr and Mrs Keene gave evidence that Mr Matsuno informed them the business was doing well and even showed Mrs Keene financial accounts supporting this view.

[38] I consider that the dismissal was unjustified and was not a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[39] As His Honour Judge Couch in *Jinkinson v. Oceana Gold (NZ) Ltd*³ stated:

² *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160 at [22]

³ [2010] NZEmpC 102

In a redundancy situation a fair and reasonable employer must, if challenged, be able to establish that it has complied with the statutory obligations of good faith dealing in s4 of the Act.

[40] At para.[40], His Honour stated:

Subsection (1A)(c) is particularly significant in cases involving restructuring such as this. It emphasises the need for full and open communication by the employer and the provision of a properly informed opportunity for the employee to participate in the process.

[41] It is my view that Link failed to provide Mrs Keene with the opportunity to participate in the process which led to her dismissal. Mrs Keene was not provided with relevant financial information from Mr Matsuno or his financial advisers about Link's financial situation before he made the decision to dismiss her. Therefore Mrs Keene was unable to comment on the situation.

[42] Link failed to follow a fair process before dismissing Mrs Keene from her employment and breached its obligations of good faith to her.

[43] Accordingly, I find Mrs Keene's dismissal unjustified.

Remedies

Compensation

[44] Mrs Keene has given evidence that she was shocked by her dismissal. She had worked hard for Link and provided it with good service. Mrs Keene says she felt betrayed by Mr Matsuno and insulted. Mr Keene described Mrs Keene's distress.

[45] The friendship between the Matsunos and the Keenes has been severely affected. Mrs Matsuno avoids Mrs Keene at the primary school attended by their children.

[46] I consider that compensation of \$10,000 under s.123(1)(c)(i) of the Act to be appropriate.

Loss of wages

[47] Mrs Keene applied for 2 translation jobs and was unsuccessful. Mrs Keene also looked for graphic design positions unsuccessfully. Mrs Keene then made a decision to study and look after her 3 children.

[48] I order 3 months loss of remuneration under s128 of the Act. This amounts to \$5400 gross.

[49] I order the awards of compensation and loss of wages to be paid by Link to Mrs Keene within 14 days of today's date.

Contribution

[50] I have considered s.124 of the Act and I am of the view that there was no contribution by Mrs Keene to her dismissal.

Costs

[51] Mrs Keene was not legally represented and so costs are not payable.

Anna Fitzgibbon
Member of the Employment Relations Authority