

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 245
5549325

BETWEEN

GAY VALDA LAURIE
Applicant

A N D

PLANTS NORTH LIMITED
and FLOWER FEVA LIMITED
Respondents

Member of Authority: Anna Fitzgibbon

Representatives: Sally Leftley, Representative for the Applicant
Damian Luiten , Director of both Respondents

Investigation Meeting: 13 August 2015 at Whangarei

Submissions Received: 13 August 2015 from the Applicant
13 August 2015 from the Respondents

Oral Determination: 13 August 2015

Written Record Issued: 14 August 2015

ORAL DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Palmers Garden World Whangarei is a franchised retail garden centre.

[2] Ms Gay Laurie was employed by Palmers Garden World in 2002 as a Florist. The floristry was called Flower Feva.

[3] In August 2004, Plants North Limited (Plants North) purchased the franchise. Mr Luiten, Director of Plants North says he purchased the entire business together with the staff at that time.

[4] Ms Laurie was employed by Plants North from 18 October 2004 under an individual employment agreement.

[5] In February 2007, Mr Luiten incorporated a new company, Flower Feva Limited, which purchased the florist business, Flower Feva, from Plants North. Mr Luiten says all staff were transferred from Plants North to Flower Feva on their existing terms and conditions of employment. Ms Laurie denies her employer changed from Plants North to Flower Feva.

[6] Ms Laurie was made redundant because Flower Feva had to cease trading immediately and this was on 19 May 2014.

[7] A short time following the dismissal on 19 May, the floristry at Palmers Garden World reopened as Candy Floral and employed new staff.

[8] Ms Laurie says she was employed by Plants North and her redundancy was unjustified both procedurally and substantively. Ms Laurie seeks remedies as a result of what she says was an unjustified dismissal after ten years of loyal service.

[9] Mr Luiten says Flower Feva employed Ms Laurie from 1 April 2007 and it ceased to trade in May 2014 as a result of its financial circumstances. This set of circumstances resulted in Ms Laurie's position becoming redundant. Mr Luiten says Flower Feva is in the process of being wound up and is shortly to be struck off the Companies Office register.

Issues

[10] There are two issues:

- (a) Which company employed Ms Laurie, was it Plants North or was it Flower Feva?
- (b) If Plants North was the employer, was the termination of Ms Laurie's employment that of a fair and reasonable employer? Alternatively, if Flower Feva was Ms Laurie's employer, was its termination of her employment that of a fair and reasonable employer?

Investigation meeting

[11] At the investigation meeting I heard a significant amount of evidence and had a number of documents produced to me by both parties.

[12] Under s.174 of the Employment Relations Act 2000 (the Act), I will not be referring to all the evidence I heard. I will be making findings in order to dispose of this matter as efficiently as possible.

First issue

Which company employed Ms Laurie, was it Plants North or was it Flower Feva?

Individual employment agreement Plants North

[13] Mr Luiten accepts that Plants North employed Ms Laurie under an individual employment agreement dated 18 October 2004. Mr Luiten says that it was very similar, or the same as, the employment agreements that had been operated by the previous owner of Palmers Garden World.

[14] The relevant provisions of the individual employment agreement for the purposes of this matter are as follows:

2.1 Individual agreement of ongoing and indefinite duration

... Your employment will commence on 18 October 2004 and will continue until either party terminates the agreement in accordance with the terms of this agreement. The clauses in this agreement may be varied or updated by mutual agreement at any time.

10.1 General termination

Either party may terminate this agreement for cause, by providing one month's notice in writing to the other party. This period of notice may be varied by mutual agreement.

11.3 Notice of termination

Where your employment is terminated on the grounds of redundancy, the Company will give not less than the notice specified in the General Termination clause. This notice is not in substitution for and not in addition to the notice set out in this clause.

Flower Feva Limited

[15] Mr Luiten says he established Flower Feva Limited (Flower Feva) in February 2007 “... for the sole purpose of carving off a discrete, manageable portion of Plants North Limited to maximise cash flow related to the payment of PAYE”.

[16] Mr Luiten says when he established Flower Feva he transferred the assets, trade business and employees from Plants North relating to Flower Feva Floristry to Flower Feva Limited.

[17] Mr Luiten says staff were aware their new employer was Flower Feva. Ms Laurie was aware Mr Luiten created a new company called Flower Feva in February 2007. Ms Laurie says she knew this because Mr Luiten told her and told her it would not change anything.

[18] Mr Luiten says he had a meeting with staff of Plants North in about March 2007 to inform and discuss the structural changes. There were no notes of that meeting and Ms Laurie denies it occurred.

[19] I do not accept a meeting took place as described by Mr Luiten in a way which meant staff were properly informed of who their new employer was and what that meant for them.

[20] Ms Laurie says she noticed that payslips in 2007 had Flower Feva on them, but as the floristry in which she worked had always been called Flower Feva she thought nothing more of it. Ms Laurie says that when she was made redundant she went through her payslips and saw that they referred to Flower Feva after 2007. However, Ms Laurie says sometimes she was paid by Plants North and sometimes by Flower Feva. This is verified by Ms Laurie's ANZ bank accounts produced to the Authority.

[21] Mr Luiten says that Ms Laurie was almost always paid by Flower Feva after 1 April 2007 and of the bank accounts provided there were only 12 occasions over seven years when she was paid by Plants North. At times this was because Flower Feva was in financial difficulties so wages were paid by Plants North or by Mr Luiten himself. Sometimes there were clerical errors and wages to be paid by Flower Feva were paid by Plants North and on those occasions Mr Luiten undertook an internal transaction to remedy the situation the following day.

[22] Mr Luiten accepted that Ms Laurie would not have been aware of any internal transfers made between the two companies.

[23] Mr Luiten referred to the resignation of two staff members, Ms Phillipa Biggs and Ms Amy Cordon from Flower Feva, both of whom had individual

employment agreements with Plants North, as evidence that Flower Feva was the employer. Mr Luiten also referred to an ACC claim by Ms Laurie which was in the name of Flower Feva.

[24] I have viewed the PAYE information from IRD, the payslips from Plants North and Flower Feva and the ACC form together with other information provided by the parties. I have taken account of Mr Luiten's evidence that Flower Feva paid Ms Laurie's wages for a number of years in support of the claim that at the date of her dismissal she was employed by Flower Feva.

[25] I do not accept Ms Laurie was employed by Flower Feva at the date of her termination on 19 May 2014.

Plants North

[26] Ms Laurie was employed from 2002 at Palmers Garden World Whangarei in the floristry known as Flower Feva. When Plants North purchased the Palmers Garden World franchise, Ms Laurie signed an employment agreement with it dated 18 October 2004. Ms Laurie's employment was never terminated by Plants North in accordance with the provisions of this individual employment agreement. It continued with Plants North, in my view.

[27] When Mr Luiten set up Flower Feva in 2007 he assumed he could simply transfer contracts, assets and staff to Flower Feva. I do not accept Ms Laurie ever agreed to a change in her employer from Plants North to Flower Feva. Ms Laurie was not offered, and was never given, an employment agreement with Flower Feva.

[28] Ms Laurie always understood that Plants North was her employer. The fact that Ms Laurie's payslips after 2007 referred to Flower Feva is not determinative of her legal employer. In any event, documents produced to the Authority included a number of entities – "*Palmers Garden World*", "*Plants North Limited*", "*Flower Feva*" and "*Flower Feva Limited*".

[29] From Ms Laurie's perspective, she was always employed at the floristry called Flower Feva. It was Mr Luiten's obligation as director and owner of Flower Feva Limited to provide Ms Laurie with an individual employment agreement and to obtain her agreement to it if he intended Flower Feva to be her employer.

[30] This is one of the fundamental obligations of an employer. Mr Luiten failed to do this.

[31] I refer to the Court of Appeal decision in *Wellington City Council v. Rasch*¹ in which it is stated:

*It is of course "a fundamental principle of our common law" that "a free citizen, in the exercise of his freedom, is entitled to choose the employer whom he promises to serve, so that the right to his services cannot be transferred from one employer to another without his assent".per Viscount Simon LC in Nokes v. Doncaster Amalgamated Collieries Ltd*²

[32] In reliance on the Court of Appeal decision in *Rasch* and the decision referred to in that case, the answer to the first question is that Plants North Limited was Ms Laurie's employer at the date of her termination.

Second issue

Was Ms Laurie's termination by Plants North on 19 May 2014 the action of a fair and reasonable employer?

Termination of employment- 19 May 2014

[33] Mr Luiten gave evidence of the financial woes of Flower Feva for a number of years prior to its closure in 2014. However, there is no such evidence in respect of Plants North.

[34] Ms Laurie was requested to attend a meeting with Mr Luiten on 19 May 2014. Mr Luiten made the request through the Floristry Manager, Ms Pam Saroz. Ms Laurie did not know what the meeting was about. Mr Luiten handed Ms Laurie and Ms Saroz prepared letters.

[35] In this letter Mr Luiten on behalf of Flower Feva Limited informed Ms Laurie that Flower Feva must cease trading immediately. As a result with effect from the close of business that night, Flower Feva would cease to trade and the shell would be likely to be sold. Therefore, Ms Laurie's position was to be made redundant.

¹ [1995] 2 ERNZ 91,96

² [1940] 3 All ER549,552

[36] The following day, when Ms Laurie was collecting her belongings from Flower Feva, she saw a sign at the floristry which stated “*Florist closed for refurbishment, we apologise for any inconvenience*”.

Candy Floral

[37] On about 20 June 2014 a floristry called Candy Floral opened at Palmers Garden World. Mr Luiten employed staff at Candy Floral, a Ms Linda Demchy was employed by Plants North trading as Palmers Garden World Whangarei on 1 September 2014 as a Garden Centre Assistant. Ms Demchy also worked as a florist at Candy Floral. More recently, a Ms Gay Dunn has been employed by Plants North as a Garden Centre Assistant.

[38] Ms Laurie had performed work as a Garden Centre Assistant when first employed at Palmers Garden World.

The law

[39] Section 103A(1) of the Act provides that employers must justify their decisions to dismiss. Whether a dismissal was “justifiable” must be determined, on an objective basis, by applying the test in subsection (2) which states:

The test is whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[40] The test of justification requires that the employer act in a manner that is substantively and procedurally fair. An employer must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[41] An employer who is proposing to terminate an employee’s position for redundancy must have genuine reasons to do so and must follow a fair procedure.

[42] I do not accept the decision to dismiss Ms Laurie to have been genuine. The dismissal was substantively unjustified.

[43] In addition, s.4(1) of the Act imposes obligations of good faith on parties to an employment relationship. This obligation extends to redundancy situations. Section 4(1A)(c) of the Act is the relevant provision which requires provision of access to an employee of information about a decision which may affect their ongoing employment. It also requires an employer to give an employee the opportunity to comment on the decision before making it. Neither of these things occurred.

[44] It is my view, that in failing to consult with Ms Laurie at all in relation to her impending dismissal, Plants North breached its obligations of good faith.

[45] In answer to issue two, the answer is “no”, the decision to dismiss Ms Laurie was not that of a fair and reasonable employer.

[46] Ms Laurie was unjustifiably dismissed by Plants North and therefore is entitled to remedies under the Act.

Remedies

[47] Ms Laurie is 75 years of age and was employed for ten years by Plants North. There is no reason for me to believe that she was not a loyal and hard working employee.

[48] Mr Luiten accepts Ms Laurie is owed holiday pay, albeit, he says, by Flower Feva and that she is also entitled to two weeks' notice which was not paid to her under the provisions of her employment agreement.

[49] Ms Laurie has given evidence of holiday pay owing to her of \$3,600 gross.

[50] I order payment by Plants North Limited of \$3,600 holiday pay to Ms Laurie within 14 days of today's date.

[51] Ms Laurie has given evidence, and this is accepted, that she was only given two weeks' wages in lieu of notice of termination, rather than four weeks notice. Ms Laurie is entitled to \$726.75 gross being a further two weeks wages in lieu of notice.

[52] I order payment by Plants North Limited of \$726.75 gross to Ms Laurie within 14 days of today's date.

[53] Ms Laurie gave evidence that her father died on 26 March 2011 and produced for the Authority the death notice. She says she took leave but was not paid bereavement leave for that time. She seeks three days bereavement leave.

[54] Mr Luiten could not recall being told about Ms Laurie's father's death. I find this hard to believe. The floristry is small and Mr Luiten had, by his own admission, been at the garden centre most days.

[55] I order payment to Ms Laurie by Plants North Limited of the amount of \$331.50 gross being bereavement leave.

[56] Ms Laurie also sought payment for in lieu days that she says she was owed by Plants North. There was insufficient evidence provided for me to make the order sought by her and I do not do so.

[57] Total holiday pay, unpaid notice and bereavement leave totals \$4,658.25 gross, all to be paid within 14 days of today's date.

Lost wages

[58] Ms Laurie gave evidence that she was unable to find work after her dismissal. She worked briefly for Ms Pam Saroz but this work was unpaid.

[59] Under s.128(3) of the Act I order Plants North Limited to pay Ms Laurie the equivalent of three months' lost wages totalling \$4,723.88 gross within 14 days of today's date.

Compensation

[60] Finally, I am required to look at compensation under s.123 of the Act.

[61] Ms Laurie gave evidence of the hurt and humiliation she suffered as a result of her dismissal at a vulnerable stage in her life. She says she felt her treatment by Mr Luiten to be callous after ten years' service. I agree.

[62] I award \$10,000 under s.123 of the Act. That sum is also to be paid by Plants North Limited to Ms Laurie within 14 days of today's date.

Anna Fitzgibbon
Member of the Employment Relations Authority