New Zealand Employment Relations Authority Decisions

Lavin v Flawless House Washing Limited (Auckland) [2018] NZERA 128; [2018] NZERA Auckland 128 (19 April 2018)

Last Updated: 4 May 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2018] NZERA Auckland 128
3020399

BETWEEN JULIE LAVIN Applicant

A N D FLAWLESS HOUSE WASHING LIMITED Respondent

Member of Authority: T G Tetitaha

Representatives: D Flaws for Applicant

D Tilson for Respondent

Investigation Meeting: 19 April 2018 at Auckland

Submissions Received: 19 April 2018 from both parties

Date of Oral

Determination:

19 April 2018

Date of Written

Determination:

26 April 2018

ORAL DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A. Julie Lavin was unjustifiably dismissed by Flawless House Washing

Limited

B. I order Flawless House Washing Limited to pay Julie Lavin the sum of

$3,000 compensation pursuant to s 123C(i) and s 124 of the Employment

Relations Act.

C. Flawless House Washing Limited is ordered to pay Julie Lavin the sum of

$2,250 as a contribution towards her legal costs. Employment Relationship Problem

[1] Julie Lavin was employed as an office administrator by Flawless House

Washing Limited on 20 August 2016.

[2] The owner of Flawless House Washing Limited John Lavin is her brother. Flawless House Washing Limited (“FHWL”)

operated two businesses. The first business is a house washing business. The second business involves cameras used for inspecting drains. It operated from John's home.

[3] Julie signed an employment agreement that contained clauses relating to confidentiality, conflict of interest and restraint of trade.

Termination

[4] It is accepted that on 3rd March 2017, John called Julie into his office. He handed her a sealed envelope. He told her that he had been told by someone else that she had breached her contract. He said he had not been shown what was in the envelope because Julie was "family". However her employment was over, and she was being paid holiday pay and four weeks wages because she was again "family". He asked she return her keys and the company's stationery card. John says that he also told Julie at that time she was being made redundant.

[5] Julie left shortly after returning the company property and taking her own personal items.

Facebook postings

[6] Julie went to a friend's place and opened the sealed envelope that contained several Facebook postings of a conversation between Julie and a nephew who I will refer to as "D". D was an employee of FHWL.

[7] The Facebook postings contained discussions about purchasing a house washing business and equipment and the employment of D by Julie. Julie says this was about purchasing FHWL from John and it was not about setting up in competition.

[8] John says he was advised that the postings indicated Julie may remove his company database which he had built up over the course of 15 years operation in business.

[9] Julie received a termination letter by email on 6 March 2017. This letter told her she was being made redundant. It did not refer to the Facebook postings. It also

offered her another position within FHWL. At that stage Julie did not wish to accept it.

Issue

[10] By consent there is only a single issue for determination that is whether Julie

Lavin was unjustifiably dismissed by FHWL on 3 March 2017.

Was Julie unjustifiably dismissed?

[11] In my view there is no doubt she was dismissed on 3 March 2017. Both Julie and John accept she was told she no longer had a job.

[12] John stated there were two reasons for her dismissal namely the redundancy and the advice he had received about the Facebook postings potentially leading to losses of his company's information database.

[13] From the evidence it is clear to me that at least 80% of Julie's job was being taken over by a new Xero accounting system John was in the process of implementing at the company. By March 2017 Julie accepted that at least two thirds of the work transferring matters to Xero had been completed.

[14] Julie's evidence suggested that the transfer of her work may have continued to at least 31 March 2017. However it was clear her job may not have continued any longer. It was fairly inevitable her redundancy would have occurred.

[15] The Facebook postings on their own were insufficient for an employer to reasonably conclude there had been serious misconduct. At best it may have triggered an investigation into potential misconduct but nothing more.

[16] Despite there being a genuine reason for the dismissal for redundancy, there was unfortunately no adherence to the statutory minimum requirements before redundancy can occur.

[17] Section 4 of the Employment Relations Act 2000 is the statutory duty of good faith. This requires an employer who is proposing to make a decision that will have an adverse effect on the continuation of employment of an employee to provide to the employee affected with access to information, relevant to the continuation of the

employees' employment, about the decision and an opportunity to comment on the information to their employer before the decision is made.

[18] Section 103A requires employers raise concerns about redundancy with their employees, give them an opportunity to be heard including the opportunity to seek legal advice and genuinely consider their responses before dismissal occurs.

[19] None of the above requirements happened here. The defects were not minor and they did create unfairness. Therefore Julie Lavin was unjustifiably dismissed by Flawless Housewashing Limited.

Remedies

[20] As Julie has a personal grievance of unjustified dismissal she is therefore entitled to seek remedies of lost remuneration and compensation.

Lost remuneration

[21] She has sufficiently mitigated her losses by finding her casual employment which eventually led to full time employment I understand, in April 2017.

[22] However the redundancy here was likely to have been genuine. At best her employment would have continued for a period of time to ensure proper consultation could occur for an additional week. She has received four weeks payment including two weeks' notice. Therefore no further lost remuneration is required to be paid.

Compensation

[23] In terms of compensation, this was an employment of short duration. It occurred for just over six months. Julie states she was angry and upset by the dismissal but did not require any other assistance.

[24] Her evidence of hurt and humiliation would justify compensation being paid but it would be at the lower end of Band One of *Waikato District Health Board v Archibald*. She asks for $6,500 although I understand from her Counsel that he is prepared to accept a sum I will set.

[25] Similar cases in the Authority have made awards of up to $7,500.1 In my view the evidence here warrants an award of $4,000. The evidence of personal hurt and humiliation was temporal. Julie got on with finding a new job and did not dwell overly long on her anger. Most of her losses were financial losses from savings prior to securing a job. This is subject to any reduction for contributory behaviour.

Contributory Conduct

[26] I am required to consider if Julie's conduct contributed to the dismissal. The Facebook postings were at times derogatory of John. Julie also discussed financial matters with another employee D that should not have been discussed such as the company's financial position. This was a reason for John to be suspicious that his financial information was being shared with someone in breach of the Julie's confidentiality and conflict of interest clauses in her employment agreement. This was especially in circumstances where Julie and employee D were looking at possibly purchasing the same business. In my view that behaviour was both causative and blameworthy.

[27] This behaviour is not serious enough to warrant a reduction of a significant amount. No actual property or information was shown as having been removed nor was their evidence of any actual harm being caused. I understand John has now sold the business to another person.

[28] A reduction is called for but in my view it is no more than 25%. Therefore I order Flawless House Washing Limited to pay Julie Lavin the sum of $3,000 compensation pursuant to s 123C(i) and s 124 of the Employment Relations Act.

Costs

[29] After hearing from both parties regarding the issue of costs Mr Tilson has provided a copy of a Calderbank offer. The Calderbank offer although on its face would appear to be reasonable is unfortunately below what has been achieved at hearing. As a consequence I can set it aside.

[30] However, I am only prepared to grant a half a day's hearing time for this

matter given it finished prior to lunch and the advocates costs are only $2,800 plus

1 *McLean v Pretty Damn Good for you Ltd & Anor* [2017] NZERA Auckland 324 where there was employment of short duration but genuine reason for redundancy due to the business closing.

GST. Therefore Flawless House Washing Limited is ordered to pay Julie Lavin the sum of $2,250 as a contribution towards her legal costs.

T G Tetitaha

Member of the Employment Relations Authority