

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 417
3058652

BETWEEN SARAH-LEE HERATIO
MOEKE-WILSON
Applicant

AND DISABILITIES RESOURCE
CENTRE TRUST
Respondent

Member of Authority: TG Tetitaha
Representatives: S-L Moeke-Wilson in person
D Jacobs, Counsel for the Respondent
Investigation Meeting: 17-18 June 2019 at Whakatane
Submissions Received: 18 June 2019 from the Applicant
18 June 2019 from the Respondent
Date of Determination: 16 July 2019

DETERMINATION OF THE AUTHORITY

- A. Sarah-Lee Heratio Moeke-Wilson was unjustifiably disadvantaged by the Disabilities Resource Centre Trust.**
- B. Sarah-Lee Heratio Moeke-Wilson was unjustifiably dismissed by the Disabilities Resource Centre Trust.**
- C. I order Disabilities Resource Centre Trust to pay Sarah-Lee Heratio Moeke-Wilson within 28 days of this determination:**
- a) Three months wages reduced by 50% for contributory behaviour; and**
 - b) \$10,000 compensation.**

Employment Relationship Problem

[1] Sarah-Lee Moeke-Wilson alleges she was unjustifiably disadvantaged then dismissed by various actions of her employer. The Disabilities Resource Centre Trust (DRC) denies this occurred. Even if it did, DRC submits Ms Moeke-Wilson has raised her personal grievance outside of the 90 day time limitation.

Non publication

[2] By consent there is an order that the names and any details identifying the respondents' clients are not to be published pursuant to clause 10 of the Second Schedule of the Employment Relations Act 2000.

Relevant Facts

[3] Ms Moeke-Wilson was employed as a Home Care Services Support Worker on or about 24 March 2017. DRC is a trust that provides home care support services to clients with disabilities.

[4] The parties signed an employment agreement that guaranteed 80 hours of work per fortnight for Ms Moeke-Wilson.

[5] On 8 March 2018 Ms Moeke-Wilson noticed her expected pay had not been received. DRC had discovered it had been overpaying her mileage due to a failure to update a client's details following her change of address. It authorised the immediate cessation of these payments without consulting Ms Moeke-Wilson.

[6] Ms Moeke-Wilson went to the DRC payroll administration to discuss this matter. It is accepted she was upset and angry about the reduced pay. She asked to speak with an administrator Kerry Smith whom processed payroll. There is a dispute about what was discussed. Ms Smith was then joined by another DRC employee Antoinette Maunder. Ms Maunder and Ms Smith took Ms Moeke-Wilson into a private room to discuss her concerns.

[7] While in the room they were joined by the CEO Bronwyn Foxx. There is a dispute about whether other issues about her performance were then raised and if suspension had occurred.

[8] On 9 March 2018 Ms Moeke-Wilson sought legal advice from the local CAB. She also rang the MBIE employment call centre. She was advised she could raise a PG regarding 8 March meeting.

[9] Following the meeting Ms Foxx undertook further investigations. By letter dated 12 March 2018 she confirmed the applicant had not been suspended and was to be paid for any shifts she did not attend due to her belief she had been suspended. The CEO confirmed the applicant had advised the Trust of the overpayments and that they would not be seeking repayment. She also raised concerns about her communication with clients.

[10] During March/April 2018 Ms Moeke-Wilson lost two clients she had cared for. This affected the number of hours of work DRC could offer her. However on 13 March 2018 she sustained a work injury and took sick leave from 13 to 30 March 2018. She returned to work on 2 April and continued working without incident until 9 July 2018.

[11] On 7 June 2018 Ms Moeke-Wilson raised a personal grievance regarding 8 March meeting. She alleged she had been told she:

- was defrauding the system by collecting travel that she was not entitled to;
- had shared information with the auditors of the Trust and there was an inference it had been impacted negatively upon the Trust;
- had not informed the Trust about any updates regarding client health;
- had requested reduction in hours but had not sought stress leave;
- had been using the Trust to fund other endeavours when she asked if she had any leave available as Housing NZ was giving her the opportunity to purchase her rental home;
- had told a client she was sick and that is why she could not work on 12 March 2018 which was incorrect;
- had been verbally suspended on 8 March 2018 then told she was not suspended but had been told not to attend clients due to her being “stressed”.

[12] The parties exchanged correspondence regarding the grievance and mediation between 27 June and 26 July 2018. During this time, Ms Moeke-Wilson's son was involved in an accident. She took further paid and unpaid leave to care for him. She did not return to work until 3 September 2018.

Dismissal

[13] On 17 September 2018 Ms Moeke-Wilson received a proposal to vary her employment agreement. The proposal was to change her hours of work from a guaranteed 80 hours per fortnight to 10 hours per fortnight. The reason for the reduction was "recent funded client changes" that impacted her workload and roster. It asked that she sign the attached variation.

[14] On 21 September 2018 the respondent wrote again citing insufficient work to provide 80 guaranteed hours per fortnight due to the loss of two clients. It also referred to her taking leave for extended periods between April to August 2018. It then proposed disestablishing her position and offering a permanent part time position. It also wished to consult over reducing guaranteed hours to 10 per fortnight. It sought her agreement to the variation to her employment agreement. If she did not accept the variation in hours, the respondent would continue to consult over the proposal to disestablish her position.

[15] On 4 October 2018 Ms Moeke-Wilson's representative replied declining the proposed reduction to her hours of work. Concerns were raised that she had raised a grievance. It noted one of her previous clients had returned to work with her providing 20 hours care. She had also worked over 80 hours in the previous fortnight. She complained about the lack of consultation and being presented with two options – accept a part time position or face termination of employment. The proposal to vary her hours on 17 September gave her no alternatives and 7 days to respond. She questioned why other options such as voluntary redundancy or sharing of available hours were not part of the consultation. She believed this was an ultimatum not consultation.

[16] The parties met on 10 October 2018.

[17] On 11 October 2018 DRC advised it could not continue paying 80 hours per fortnight. It did not consider the suggestion of calling for voluntary redundancies, changing work

allocations and client relationships as “realistic or commercially practical.” It had “decided to proceed with disestablishment of your current 80 guaranteed hours per fortnight position.”

[18] On 17 October 2018 the applicant raised a further personal grievance of unjustified dismissal and disadvantage.

[19] Redeployment to a part time position with reduced guaranteed hours was offered on the basis Ms Moeke-Wilson could confirm her availability. She confirmed availability between 8 am and 5 pm Monday to Friday. She was subsequently offered 10 guaranteed hours per fortnight. She did not accept the redeployment option.

[20] Ms Moeke-Wilson’s employment ended on 8 November 2018.

Issues

[21] The issues for determination are:

- a) Was a personal grievance about the meeting on 8 March 2018 raised within 90 days? If not should leave be granted to raise it out of time?
- b) Was the applicant unjustifiably disadvantaged by a meeting held on 8 March 2018?
- c) Was the applicant unjustifiably disadvantaged and/or dismissed for redundancy?

Law

[22] Employees must raise personal grievances “within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later...”¹ The Authority may grant leave to raise a personal grievance after the expiration of the 90 day period if it is satisfied the delay in raising the grievance was occasioned by exceptional circumstances and it is just to do so.²

[23] In personal grievance matters, an employer’s actions must be justified. The test is whether the employers actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.³ In applying this test, the Authority must consider the matters set out in s.103A(3). These matters

¹ Section 114(1) Employment Relations Act 2000.

² Section 114(4) Employment Relations Act 2000.

³ Section 103A(2) Employment Relations Act 2000.

include whether having regard to the resources available, an employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely considered the employees explanation prior to dismissal.

[24] Any dismissal/disadvantage is not unjustifiable if the procedural defects were minor or did not result in the employee being treated unfairly.⁴

[25] Redundancy arises where an employee is superfluous to the business's needs. This could arise where an employer seeks to make the business more efficient. The Authority may review the business decision to determine whether the decision, and how it was reached, were what a fair and reasonable employer could have done in all the relevant circumstances.⁵

[26] A decision to make an employee redundant must be shown to be genuine where genuine means the decision is based on business requirements and not used as a pretext for dismissing a disliked employee. If an employer can show the redundancy is genuine and that the notice and consultation requirements of s 4 of the Act have been duly complied with that could be expected to satisfy the s 103A test. The subjective findings about what the particular employer has done in any case still have to be measured against the Authority's assessment of what a fair and reasonable employer could have done in the circumstances.⁶

[27] The genuineness of the redundancy remains a key focus. Once that is established, if an employer concludes that the employee is surplus to its needs, the Authority is not to substitute its business judgment for that of the employer.⁷

Were the personal grievances about the 8 March meeting raised within 90 days?

[28] Ms Foxx's letter dated 12 March 2018 was the final action of the employer relating to any disadvantages from the 8 March meeting. The letter was a continuation of the actions giving rise to some of the disadvantages. The letter purported to resolve concerns Ms Moeke-Wilson had arising from the meeting as well as raising a further concern about her behaviour towards clients. Therefore the date from which the time limitation for raising a personal grievance starts is 12 March 2018.

⁴ Section 103A(5) Employment Relations Act 2000.

⁵ *Rittson-Thomas T/A Totara Hills Farm v Davidson* [2013] NZEmpC 39 at [53] – [54].

⁶ *Grace v Brake Team Accounting* [2014] NZCA 541, [2015] 2 NZLR 494, (2014) 10 NZELC 79-049, [2014] ERNZ 129, (2014) 12 NZELR 219 at [85].

⁷ *Scarborough v Micron Security Products Ltd* [2015] NZEmpC 39 at [37].

[29] Ms Moeke-Wilson raised personal grievances on 8 June by way of a letter dated 7 June 2018. Some of these grievances have been raised within the 90 day time limitation. I have identified those raised within time below. Ms Moeke-Wilson does not require leave to raise those personal grievances.

[30] However there are some grievances recorded in the 7 June letter below that I have found did not arise on 8 March 2018 but at a much earlier date. Those grievances are not raised within time. No basis for extending time has been shown. I have dismissed those grievances as stated below.

Was Ms Moeke-Wilson unjustifiably disadvantaged by DRC's actions on 8 March 2018?

[31] I am not persuaded Ms Moeke Wilson was told by DRC on 8 March 2018 that she had inappropriately shared information with the auditors of the Trust and this had impacted negatively upon the Trust. The audit occurred in 2017. I accept the evidence of Ms Smith and Ms Maunder that they had a conversation with Ms Moeke-Wilson arising from concerns she had raised with the auditors in September 2017 about her annual leave balances. Ms Maunder met with her to explain her leave balance and an agreement to authorise a cashing up of her leave to assist with her house purchase on 19 September 2017. The grievance about this has been raised well outside of 90 day time limitation. No basis for extending the time limitation has been shown. This disadvantage is dismissed.

[32] Ms Moeke-Wilson and Ms Maunder confirmed that she raised issues about her request for reduction in hours on 8 March 2018. The reduction of hours request was made in 2017 well outside of the time for raising a personal grievance in June 2018. However by 7 June Ms Moeke-Wilson was no longer seeking to reduce her hours because she is being paid for 80 guaranteed hours she was not working. When DRC proposes reducing her hours on 17 September 2017 she subsequently refuses. Despite the time limitations I cannot see any disadvantaging action by DRC regarding her request to reduce her hours in these circumstances. This disadvantage is dismissed.

[33] Ms Moeke-Wilson belief Ms Foxx had stated she was using DRC to fund other endeavours on 8 March was denied. Ms Foxx recalls reference to DRC's support for her by cashing up annual leave to fund her deposit to purchase her home which had occurred in

September 2017. I am not persuaded there was any disadvantaging behaviour. This disadvantage is dismissed.

[34] There were subsequent issues raised by Ms Foxx on 11 and 12 March 2018 about a client ringing DRC stating Ms Moeke-Wilson was too sick to attend work which Ms Moeke-Wilson denied. Upon checking DRC was told by the client that Ms Moeke-Wilson had told her she had been suspended. Ms Moeke-Wilson confirmed she had told her this and that the DRC co-ordinator would contact her about a replacement. Ms Foxx's advice that this was inappropriate behaviour is not disadvantaging action. This was a potential breach of the DRC code of conduct regarding client communication. A reasonable employer would have taken action to ensure this did not occur again by raising their concerns. I cannot see any disadvantaging behaviour by DRC. This disadvantage is dismissed.

[35] Several grievances relate to Ms Moeke-Wilson belief she had been told she had acted fraudulently. Ms Maunder confirmed she made comment to Ms Moeke-Wilson about whether "she thought it odd that she continued to be paid the same amount of money for travel when she knew she had advised us of the change of address for the client". Ms Moeke-Wilson then offered to repay the funds in total. The comment does imply Ms Moeke-Wilson knew or should have known she was receiving funds she was not entitled to receive. This infers potential dishonesty. There was no basis for this comment other than speculation. Ms Moeke-Wilson's concerns that she had done something wrong would not be allayed by the next action below.

[36] I am satisfied on the evidence that Ms Moeke-Wilson was subsequently placed upon paid suspension by Ms Foxx at the 8 March 2018 meeting. Ms Smith's handwritten contemporaneous note confirmed Ms Foxx placed Ms Moeke-Wilson on "paid suspension". However Ms Foxx's letter dated 12 March 2018 denies any suspension occurred. She accepted this was incorrect at hearing given Ms Smith's note. These actions were disadvantages to Ms Moeke-Wilson's employment.

[37] The comments about her honesty and the suspension were disadvantages to Ms Moeke-Wilson's employment. Having regard to DRC's resources available, DRC failed to sufficiently investigate the allegations, raise concerns, or give Ms Moeke-Wilson a reasonable opportunity to respond and genuinely consider any explanation prior to the

disadvantaging action occurring. These procedural defects especially in respect of the suspension were not minor and did result in Ms Moeke-Wilson being treated unfairly.

[38] Sarah-Lee Heratio Moeke-Wilson was unjustifiably disadvantaged by the Disabilities Resource Centre Trust.

Was Ms Moeke-Wilson unjustifiably dismissed?

[39] On 17 September DRC sought agreement to changing Ms Moeke-Wilson's hours of work from 80 guaranteed hours per fortnight to 10. By 21 September DRC were seeking to disestablish her position as well as consult about the reduction in guaranteed hours. If no agreement about the guaranteed hours could be reached, DRC would continue to consult about disestablishing her position. Ms Moeke-Wilson did not agree to reduced hours.

[40] The parties employment agreement set out the process for reducing guaranteed hours in clause 7.2 below:

7.2 The guaranteed hours of work may be increased by agreement between the Employer and the Employee following any review by the Employer. If the Employer's business circumstances change, the guaranteed hours may be decreased by the Employer following consultation with the Employee in good faith providing the Employer gives the Employee reasonable notice in advance.

[41] There were changes in the employers business circumstances. Two clients had left Ms Moeke-Wilson's care. She refused to make herself available for work. DRC would have been entitled to enact this clause and seek to consult on reducing her guaranteed hours of work.

[42] While agreement may be sought, it is not required for reducing guaranteed hours following consultation under clause 7.2. Ms Foxx believed she was acting under clause 7.2 with the DRC proposal made on 21 September. This cannot be correct because DRC were seeking to disestablish her position unless Ms Moeke-Wilson agreed to reduce her guaranteed hours. It was accepted the position still existed albeit with reduced guaranteed hours.

[43] There were no genuine reasons for disestablishing Ms Moeke-Wilson's position and therefore terminating her employment as a consequence. A reasonable employer would have applied clause 7.2. to reduce the guaranteed hours to an amount that it could guarantee whether this was 10 or more hours. The amount of the reduction to guaranteed hours should have been identified during the consultation process. There was no basis to seek to

disestablish her position prior to consulting on the reduction of guaranteed hours. This process was used to force Ms Moeke-Wilson to accept reduced hours or face termination.

[44] Sarah-Lee Heratio Moeke-Wilson was unjustifiably dismissed by the Disabilities Resource Centre Trust.

Remedies

[45] Because Ms Moeke-Wilson has proven personal grievances, she is entitled to seek remedies of lost wages and compensation. I have taken a global approach to the award of wages and compensation for all of the proven grievances.

[46] Lost wages of up to three months may be awarded unless there is a failure to mitigate losses. Ms Moeke-Wilson did not obtain any employment after she was dismissed. She advised this was due to clause 27.1 of her employment contract that she believed prevented her from applying for similar jobs in her area. Clause 27.1 is a non-solicitation clause. This forbids her from working for the respondent's customers or clients for 6 months. When she approached other caregiver service providers in the area, she states she was turned away because of this clause.

[47] I am satisfied Ms Moeke-Wilson attempted to find work. She is entitled to three months lost wages subject to any reduction for contributory behaviour.

[48] Ms Moeke-Wilson gave evidence that placed her hurt and humiliation in the lower end of Band Two.⁸ She is entitled to compensation starting at \$20,000 subject to any reduction for contributory behaviour.

Contributory Behaviour

[49] There was contributory behaviour requiring the reduction of remedies. DRC could have provided up to 80 hours work but Ms Moeke-Wilson refused to accept it. Ms Moeke-Wilson confirmed she refused work that was offered outside of her designated hours of availability. Further she could provide no other explanation for this behaviour other than a sense of entitlement to retain the hours she had previously worked. This behaviour triggered DRC's September proposals to reduce her hours of work. This was both causative and blameworthy.

⁸ *Waikato District Health Board v Archibald* [2017] NZEmpC 132.

[50] Further Ms Moeke-Wilson confirmed she had told a client about her suspension. This was a breach of the code of conduct that was raised with her in the letter dated 12 March. This letter formed part of the personal grievances she has raised. This behaviour was both causative and blameworthy.

[51] She also admitted providing her daughter with a client's number to call and check if she still wanted to work with her. This is after Ms Moeke-Wilson had been told by DRC not to contact the client because she did not wish to work with her. This was serious misconduct. This subsequently discovered behaviour would also warrant further reduction in remedies.

[52] A 50% reduction in remedies is warranted.

[53] I order Disabilities Resource Centre Trust to pay Sarah-Lee Heratio Moeke-Wilson within 28 days of this determination:

- c) Three months wages reduced by 50% for contributory behaviour; and
- d) \$10,000 compensation.

[54] There is no basis to award costs because Ms Moeke-Wilson was self-represented.

TG Tetitaha
Member of the Employment Relations Authority