New Zealand Employment Relations Authority Decisions

Murphy-Fukofuka v Kids Republic Playland Limited (Wellington) [2017] NZERA 2058; [2017] NZERA Wellington 58 (12 July 2017)

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Last Updated: 23 July 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2017] NZERA Wellington 58
5630020

BETWEEN WHITNEY MURPHY- FUKOFUKA

Applicant

AND KIDS REPUBLIC PLAYLAND LIMITED

Respondent

Member of Authority: Trish MacKinnon

Representatives: Russell Ward, Advocate for Applicant

Stefan Smith, Advocate for Respondent

Investigation Meeting: 3 May 2017 at Palmerston North

Submissions Received: 10 and 24 May 2017 from the Applicant

17 May 2017 from the Respondent

Determination: 12 July 2017

Employment relationship problem

[1] Whitney Murphy-Fukofuka claims to have been disadvantaged by the unjustifiable actions of her former employer, Kids Republic Playland Limited (KRPL) which included placing her on "garden leave". Ms Murphy-Fukofuka also claims her employer failed to observe its statutory and contractual obligations of good faith towards her and breached various provisions of her Individual Employment Agreement (IEA).

[2] Ms Murphy-Fukofuka seeks compensation in the sum of $15,000 as compensation for humiliation, loss of dignity and injury to feelings she experienced as a result of the way KRPL treated her both during her employment and after it had

ended. She also seeks wage arrears and the imposition of a penalty on KRPL as well as reimbursement of the costs she incurred in pursuing her claims. Ms Murphy- Fukofuka withdrew some further claims in the course of the Authority's investigation.

[3] KRPL denies all of Ms Murphy-Fukofuka's claims. It says she was not disadvantaged in her employment and it always acted in good faith towards her. KRPL further says Ms Murphy-Fukofuka was not placed on garden leave but was suspended on full pay by Stefan Smith, who was at the time a director of KRPL.

[4] KRPL says it paid Ms Murphy-Fukofuka "to her contracted hours" for the period she was suspended and has paid all wages owing to her. It says it informed Ms Murphy-Fukofuka in 2015, and also informed her representative in February 2016, that she would need to provide evidence to validate her wages claim before it would make any payments to her.

Background

[5] Ms Murphy-Fukofuka was employed as a Casual Playland Assistant by KRPL from 2 December 2014. Her position changed from casual to part-time when she signed an amendment to her individual employment agreement on 14 August 2015. This was at her employer's request.

[6] She resigned her employment on 2 October 2015, giving two weeks’ notice which she intended to work out. In the event, her employer did not wish her to work out all her notice period. She claims she was placed on "garden leave" on 7 October

2015 by Ms Smith, the other director of KRPL. I will return to this shortly.

[7] Ms Murphy-Fukofuka subsequently raised an issue of underpayment of wages with KRPL. When she was unable to get a satisfactory response to her concerns from her employer, an employment advocate, Mr Ward, pursued the matter on her behalf. He raised a number of employment issues with KRPL by email on 31 December

2015. These included a personal grievance under s. 103(1)(b) of the Employment

Relations Act 2000 (the Act).

[8] The parties were to attend mediation in late May 2016. However, KRPL advised the Mediation Service on 29 April 2016

that the mediation was to be postponed "until further notice", citing a matter that required further investigation.

[9] Ms Murphy-Fukofuka lodged an application in the Authority on 17 June 2016. The parties were directed to mediation in the course of a telephone conference on 15

August 2016 and attended mediation on 26 October 2016 but did not resolve the matters between them.

Issues

[10] The issues for determination are:

a. Whether Ms Murphy-Fukofuka was disadvantaged by an unjustifiable action or actions by KRPL;

b. Whether Ms Murphy-Fukofuka is owed wages in respect of her employment with KRPL;

c. Whether KRPL breached its statutory obligations of good faith to Ms Murphy-Fukofuka and/or its contractual "good employer" obligations to Ms Murphy-Fukofuka; and, if so,

d. Whether a penalty should be imposed on KRPL.

Did KRPL disadvantage Ms Murphy-Fukofuka by its unjustifiable action/s?

[11] In Mr Ward's email to KRPL of 31 December 2015, he cited the following matters as unjustifiable actions by her employer that disadvantaged Ms Murphy- Fukofuka in her employment:

a. The company's response to her demand for payment of wages owing and payslips, which had been to tell her she owed KRPL $20;

b. Ms Smith's stalking, harassing and assaulting Ms Murphy-Fukofuka in her new workplace on 22 December 2015;

c. Mr Smith's writing to Ms Murphy-Fukofuka's new employer on 22

December 2015 accusing her of harassing and physically abusing KRPL staff which, in Mr Ward's assertion, was for the purpose of humiliating her in her new work place and attempting to have her dismissed from that employment.

[12] In the same email Mr Ward alleged KRPL breached its statutory obligations of good faith towards Ms Murphy-Fukofuka, and potentially also its contractual obligations to her. The matters he cited arose from the same factual situation in

relation to her wages claim and her claims regarding KRPL's attempts to have her dismissed from her new employment.

[13] Mr Ward did not raise garden leave as part of Ms Murphy-Fukofuka's personal grievance in his email. In the course of questioning, Ms Murphy-Fukofuka clarified her claim to have been disadvantaged did not relate to the fact of being placed on garden leave. She said she had not been unhappy at the prospect of being paid for a period she was not required to work. However, she believed she was disadvantaged in relation to the unpaid wages for that period.

[14] Ms Murphy-Fukofuka's employment agreement contained no provision for either garden leave or for suspension. However, in view of her clarification that she did not take issue with the fact of being placed on garden leave, it is not necessary for me to pursue the lack of contractual sanction for the actions of KRPL in that matter. I note that, although KRPL's statement in reply denied Ms Murphy-Fukofuka had been placed on garden leave, subsequent correspondence from Mr Smith to Ms Murphy-Fukofuka, which I will return to later, confirmed she had indeed been placed on such leave.

[15] Ms Murphy-Fukofuka has claimed arrears of wages and breaches of good faith arising from the same factual situation as her personal grievance for disadvantage. It is more appropriate to deal with these matters as claims for wage arrears claim and good faith breaches and I will return to these claims shortly.

[16] The other matters she has raised as unjustifiable actions all relate to events that took place more than two months after her employment with KRPL had terminated. The incidents concern alleged actions by the directors of KRPL. These had the potential to disadvantage her in her new employment but, as the alleged actions did not concern her employment with KRPL which had already ended, they do not come within the scope of s.103(1)(b) of the Act and cannot form grounds for a personal grievance claim.

Are wages owed?

[17] The short answer is that no wages are owed. Ms Murphy-Fukofuka acknowledged in the course of the investigation meeting that on 26 October 2016

KRPL had paid her the wages that had been owed to her since October 2015.

[18] I am satisfied from evidence produced by KRPL that on 26 October 2016 it paid Ms Murphy-Fukofuka for 9.75 hours of garden leave; 5 hours of sick leave owing from 3 October 2015; holiday pay calculated on those 14.75 hours; the employer's KiwiSaver contribution due on that sum; and one year's interest calculated at 14 percent on the total sum of the pay items listed above.

Did KRPL breach its statutory and/or contractual good faith obligations?

[19] The statutory provision Ms Murphy-Fukofuka claims was breached is at s. 4 of the Act which provides as follows:

4. **Parties to employment relationship to deal with each other in good faith**

(1) The parties to an employment relationship specified in

subsection (2)—

(a) must deal with each other in good faith; and

(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—

(i) to mislead or deceive each other; or

(ii) that is likely to mislead or deceive each other.

[20] Clause 2 of Ms Murphy-Fukofuka's employment agreement described KRPL's obligations and responsibilities to her, which included that it would "act as a good Employer in all dealings with the Employee or Employee representative in good faith in all aspects of the employment relationship." A good employer was defined, for the purposes of the employment agreement, as one "who treats Employees fairly and properly in all aspects of their employment."

[21] I find KRPL breached both its statutory and contractual obligations to Ms Murphy-Fukofuka in respect of her wages. It also breached s. 4 of the Wages Protection Act 1983 (WPA) which provides that, subject to certain exceptions that are not relevant in this instance, when any wages become payable to a worker, an employer shall pay the entire amount of those wages to the worker without deduction.

[22] KRPL's failure to deal in good faith with Ms Murphy-Fukofuka with regard to her wages is apparent from the following events. On 14 October 2015 Ms Murphy- Fukofuka emailed her employer requesting a payslip. She did so because the pay that had just gone into her account seemed light to her. When she did not receive a reply she emailed again the same evening asking if she could come in to the workplace on

15 October to collect the payslip. That prompted an immediate emailed response in the negative from Ms Smith.

[23] Ms Murphy-Fukofuka then asked for her payslip to be left at KRPL's reception the next day so she could collect it. She was informed by return email that Ms Smith would not be at the workplace that day. She then asked her employer to have the payslip ready for her by Friday lunchtime. She received the payslip by email the following evening with an instruction from Mr Smith that, if she had any queries about her pay, she was to email him only.

[24] The payslip, which was for the pay period ended 11 October 2015, records that she was paid 27.25 hours. Those were the hours which, Ms Murphy-Fukofuka believed, were the hours she had worked in the first week of that two week pay period. She said that on reading the payslip she believed she had been underpaid. Her pay did not include any hours for garden leave or five hours of sick leave she had claimed for Saturday 3 October 2015. According to Ms Murphy-Fukofuka she contacted Mr Smith on 15 October telling him she had been underpaid and referring to the sick leave and to the 11.75 hours of pay she believed was owing for garden leave.

[25] Ms Murphy-Fukofuka had complied with Mr Smith's instruction that she contact only him if she had queries about her pay. She did have queries which she made promptly to Mr Smith. It was incumbent on him to respond to her accurately and just as promptly. He did not. I find this constituted a breach of good faith under s.4 of the Act and a breach of clauses 2.2 and 2.3 of Ms Murphy-Fukofuka's employment agreement.

[26] His response was made five days later, after Ms Murphy-Fukofuka's notice period had ended, and informed her:

"You are correct you were placed on garden leave and as such are entitled to your usual hours pay until your resignation date. **As far as I am aware you have been paid these hours already to the contract**. The final payment is now due to be made at the end of the Pay period and you will be terminated and as such receive what you are due in full as per your contract.

You are currently not entitled to your holiday pay until this termination event occurs = next pay round." [Bolding added]

[27] The most cursory of inquiries made by Mr Smith would have made him aware that Ms Murphy-Fukofuka had been paid only for the hours she had worked between Monday 28 September and Friday 2 October 2015. He would have known she had not been paid the 5 hours of sick leave she had claimed on her timesheet for 3 October

2015, yet his response failed to address her query around payment for those hours. He would also have known she had not been paid for any hours for the days from 7

October when Ms Murphy-Fukofuka had been placed on garden leave until the end of that pay period on 11 October.

[28] Ms Murphy-Fukofuka's timesheet for the pay period ending 11 October 2015 clearly shows she had claimed as "sick leave" the five hours for which she had been rostered to work. A line had been drawn through her recorded start time and an annotation made stating "Did not inform me she was sick".

[29] Ms Murphy-Fukofuka emailed Mr Smith again on 31 October 2015 asking if there was a reason why she had not been paid correctly in the previous pay cycle, which was the one for the period ending 11 October. She noted the error had not been corrected in the pay cycle for the period ending 25 October and that she had contacted him several times about this. She invited KRPL to mediation through the Ministry of Business, Innovation and Employment.

[30] Ms Murphy-Fukofuka ended her email by requesting, for a second time, a copy of all her time, wage and holiday records. She had first made the request by text on 23 October 2015 and had received no response. During the Authority's investigation Mr Smith acknowledged receiving that text request. He said he had supplied full records to Ms Murphy-Fukofuka in November 2015. Under questioning he said he had handed the records to another former KRPL employee to give to her. I do not accept that and find KRPL did not supply the time, wage and holiday records until December 2016 after I had issued a direction for it to do so.

[31] After further correspondence from Ms Murphy-Fukofuka about her unpaid hours, Mr Smith responded on 23 December 2015 that she had been overpaid by 1.25 hours in the pay period ending 11 October 2015. He informed her that she owed KRPL $20 and said he looked forward to receiving payment from her in due course. Mr Smith also said in the email that "there is no sick pay owing as there was never any sick leave requested" and that this could not be done retrospectively. With regard to the garden leave owing, Mr Smith's response was that it "is paid per contracted hours and this was paid in full."

[32] Mr Smith's assertions regarding the payment in full of the garden leave were plainly wrong. His response regarding sick leave was also inaccurate as Ms Fukofuka

had contacted the duty manager on 3 October 2015 to report her inability to work due to illness. She had also responded to a text query from Ms Smith, in the days before she was placed on garden leave, informing her of her illness on the previous Saturday. Ms Smith's response was "Ok" which gave her no reason to believe her employer would subsequently refuse to pay for the sick leave.

[33] Ms Smith acknowledged under questioning payment for the sick leave had been withheld because Ms Murphy-Fukofuka had contacted a Duty Manager, rather than herself, on 3 October about her illness. She conceded the payment probably should have been made at the time it was due but said that, at the time, she did not believe it had been a genuine sick day. That had never been raised with Ms Murphy- Fukofuka.

[34] In correspondence over the following months between Mr Smith and Ms Murphy-Fukofuka's employment advocate, Mr Smith adopted the approach that KRPL would settle Ms Murphy-Fukofuka's pay dispute if she could prove her claim. He omitted to inform her that her references to being owed 11.75 hours of garden leave were not in accordance with the amendment she had signed to her employment agreement in August 2015. That agreement had specified her weekly hours would comprise three shifts of 3.25 hours on Wednesday, Thursday and Friday each week. The amendment also referred to additional hours of employment that "may be available".

[35] Ms Murphy-Fukofuka acknowledged in the course of the investigation meeting that the weekly hours of work under her amended employment agreement of

14 August 2015 were 9.75, not the 11.75 she had referred to in her email of 22

December 2015. Since signing the amendment in August 2015 she said the actual hours she worked had not really changed and she had simply forgotten what they were.

[36] That seems reasonable given that, in the pay periods between signing that amendment and the last pay she received immediately before 11 October 2015, Ms Murphy-Fukofuka had never worked the minimum specified 9.75 hours. Her hours had ranged between 37 and 55.75 per fortnight and had included one week of bereavement leave when she had been paid for 11.25 hours.

[37] Ms Murphy-Fukofuka's evidence was that she was happy to be paid for the hours specified in her employment agreement for the time she was on garden leave and had genuinely made a mistake when she had referred to those hours as being

11.75 in her communications with Mr Smith. That mistake could have easily been corrected by Mr Smith informing her that she was entitled to payment of only 9.75 hours not the 11.75 hours she requested to be paid.

[38] Mr Smith acknowledged in the Authority's investigation he could have been more communicative. He also acknowledged an email he had sent to Ms Murphy- Fukofuka informing her that she had been paid her garden leave in full was "a little bit misleading".

[39] It is hard to avoid the conclusion that a more open and communicative approach from KRPL to Ms Murphy-Fukofuka during her notice period could have avoided the need for these proceedings entirely.

Should a penalty be imposed?

[40] Ms Murphy-Fukofuka seeks the imposition of a penalty against KRPL in respect of its failure to comply with its statutory and contractual obligations of good faith. She asks that part of the penalty be paid to her.

[41] A penalty may be imposed at the discretion of the Authority and is generally imposed for the purpose of punishment as well as discouragement to others. I have found KRPL breached its statutory good faith obligations to Ms Murphy-Fukofuka in that it was not open and communicative with her when she queried her pay during the period when her employer had placed her on garden leave.

[42] It also breached its contractual obligation to treat Ms Murphy-Fukofuka fairly and properly in all aspects of her employment. As noted earlier, in not responding immediately to Ms Murphy-Fukofuka's request for all wage, time, and holiday records, KRPL breached its obligations under s. 130(2) of the Act.

[43] The breaches directly affected Ms Murphy-Fukofuka by depriving her, for twelve months, of remuneration to which she was entitled. Any such breach is a serious matter for the employee. In this instance the employer acknowledged, 19 months after the event, that its communication could have been better. However, both Mr and Ms Smith also stated their belief that the payment in full, plus interest, of the

amounts owing to Ms Murphy-Fukofuka one year after the monies fell due resolved all matters between her and KRPL.

[44] I agree that belated payment mitigated to some extent KRPL's breaches of its statutory and contractual obligations to Ms Murphy-Fukofuka. I do not agree that the payment mitigated the breaches to the extent that a penalty should not be imposed. I find a penalty is appropriate when all the circumstances are considered.

[45] Section 133A of the Act lists a non-exhaustive number of factors to be taken into account in determining the amount of a penalty. While Ms Murphy-Fukofuka's employment ended in October 2015 before s.133A came into force, those factors form a useful guide and I will use them accordingly, following the recent approach of the

Employment Court.1

[46] The matters include a consideration of s.3 of the Act which specifies as its first object the promotion of productive employment relationships through the requirement for good faith behaviour in all aspects of the employment environment and the employment relationship. The findings I have made in respect of KRPL's breach of good faith and failure to treat Ms Murphy-Fukofuka fairly and properly relate to her pay at the end of the employment relationship. While the relationship had only a short time to run before its termination, that provided no excuse to the employer to ignore its obligations.

[47] Following the Employment Court's process for the assessment of penalties, I note that the breaches I have identified are of the "good employer" provisions of Ms Murphy-Fukofuka's employment agreement and of the employer's duty of good faith under s.4 of the Act. I noted also a breach relating to KRPL's failure to provide time, wage and holiday records immediately on request. During Ms Murphy-Fukofuka's employment I consider there were three separate statutory and contractual breaches by KRPL relating to her requests on 14 and 15 October 2015 and the employer's failure to respond.

[48] Each breach has a maximum penalty of $20,000, giving a potential total of

$60,000. I find a global penalty to be appropriate, rather than three separate penalties. This is also in accordance with Ms Murphy-Fukofuka's application.

1 *Lumsden v Skycity Management Limited* [2017] NZEmpC 30

[49] An assessment of the severity of the breaches to establish a starting point for considering provisional penalties includes a consideration of aggravating and mitigating factors. I consider underpayment of an employee to be a serious breach of an employer's obligations. Ms Murphy-Fukofuka was deprived of wages to which she was entitled for just over one year. That was of moment to her. KRPL's reparation on

26 October 2016, by paying all outstanding entitlements plus interest calculated at a generous rate mitigated its breaches to a considerable extent. Taking these factors into account I find a discount of two thirds on the maximum penalty to be appropriate, giving a provisional starting point of $20,000.

[50] The next step is to consider the means and ability of the person in breach to pay the provisional penalty. I have received no direct evidence of KRPL's financial capability. However, in a separate case involving KRPL and another employee, I accepted evidence suggesting the company operated under financial constraints.2 I do so again in this case. Taking that into account I deem a 50% reduction to the starting point to be appropriate resulting in a provisional penalty of $10,000.

[51] The final step consists of applying the proportionality or totality test to ensure the amount of a penalty is just in all the circumstances and is proportional to the severity of the breach and the harm it occasioned. In monetary terms, Ms Murphy-Fukofuka was underpaid by $262.53, including the employer's KiwiSaver contribution. KRPL paid that amount plus $37.47 in interest on 26 October 2016. That is a relatively small amount and I consider it appropriate to reduce the provisional penalty to take that into account.

[52] I find $2,000.00 to be an appropriate penalty in all the circumstances. Half of that amount is to be paid to Ms Murphy-

Fukofuka to acknowledge the loss of enjoyment she sustained from not having the use of money at the time it was due to be paid and the extent of the effort she has had to make to pursue the sums owing to her. As I have noted earlier, if KRPL had adopted a more open and communicative approach during Ms Murphy-Fukofuka's notice period it is unlikely this matter would

have come to the Authority.

2 *K Lowe v Kids Republic Playland Limited* [2017] NZERA Wellington 53

Determination

[53] Ms Murphy-Fukofuka does not have a personal grievance for unjustified disadvantage and is not owed wage arrears.

[54] However, KRPL breached its statutory and contractual obligations of good faith to her and failed to provide her with wage and time and leave records immediately upon her request as required by the Act. It is ordered to pay a penalty of

$2,000 within 28 days of the date of this determination. Half of that amount is to be paid to Ms Murphy-Fukofuka and the other half to be paid to the Authority for payment to the Crown account.

Costs

[55] The issue of costs is reserved.

Trish MacKinnon

Member of the Employment Relations Authority
