

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 126  
3024553

BETWEEN

AARTI PRASAD

Applicant

AND

C. H. ROBINSON

WORLDWIDE (NZ) LIMITED

Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person  
Garyn Hayes for the Respondent

Investigation Meeting: 23 April 2018

Determination: 26 April 2018

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**DETERMINATION OF THE AUTHORITY**

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- A. The dismissal of Aarti Prasad by C. H. Robinson (Worldwide) NZ Limited (CHR) was unjustified.**
- B. In settlement of her personal grievance CHR must pay Ms Prasad the following sums within 28 days of the date of this determination:**
- (i) \$18,750 as lost ordinary time remuneration; and**
  - (ii) \$1,131 as compensation for lost benefits; and**
  - (iii) \$1,590 as holiday pay due on the amounts awarded at (i) and (ii); and**
  - (iv) \$10,000 as compensation for humiliation, loss of dignity and injury to feelings.**
- C. CHR must also pay to the Authority, for transfer to the Crown Account, \$2000 as a penalty for a breach of the duty of good faith.**
- D. There is no order for costs.**

## **Employment Relationship Problem**

[1] Aarti Prasad worked in export operations for C H Robinson (Worldwide) NZ Limited (CHR), a freight logistics business based near Auckland Airport. A major part of her role was dealing with loading plans for CHR's largest customer in New Zealand, Griffins Foods. At 2.36pm on 27 November 2017 CHR export manager James Hokke got a detailed email from a Griffins representative complaining about errors in Ms Prasad's work.

[2] At 5pm the following day Mr Hokke and CHR's New Zealand regional director Garyn Hayes met with Ms Prasad. They gave her a letter of dismissal. It was issued on the letterhead of CHR's parent company in Australia and signed by Walid Kaddour, its Melbourne-based human resources manager.

[3] Mr Kaddour happened to be in CHR's Auckland office on a pre-arranged visit during 27 November and 28 November. Mr Hokke spoke to him and Mr Hayes about the Griffins complaint. They decided to remove Ms Prasad from work on Griffins business and to offer her another role doing import work for other clients. Mr Kaddour met with Ms Prasad twice to discuss those changes. She asked to see the Griffins complaint but he refused her request. In an email to her on the morning of 28 November Mr Kaddour said there was "no point in sharing the content as the customer has decided the outcome". He wrote that if she did not want to be re-deployed to the role offered, "then I won't have any other alternative but to terminate your employment". Ms Prasad replied that this was unfair and asked to attend mediation about the matter as an employment relations issue. By email at 12.03pm Kaddour replied that CHR had been fair and referred to a termination clause in her employment agreement. He wrote that he was happy for Ms Prasad to appoint a meeting day and time "to discuss this further with an independent authority". However the letter of dismissal was prepared and given to Ms Prasad five hours later by Mr Hayes and Mr Hokke. Mr Kaddour had meanwhile left for the airport to return to Melbourne.

[4] The letter Mr Kaddour left for delivery to Ms Prasad began with this paragraph:

We regret to advise that despite numerous performance meetings you have not achieved the desired standards required to satisfy Griffins in your role as

Account Manager and they have consequently requested an immediate replacement.

[5] It then listed, in bullet point form, what were described as “a sample of service problems” Griffins had experienced with Ms Prasad’s work. The “sample” comprised extracts from emails sent by a Griffins representative. There were no identifying details about the date or time of the email from which each extract was drawn. From the copy of the 27 November email available to the Authority investigation, it was clear only two of the ten extracts were copied from that email.

[6] Ms Prasad raised a personal grievance for unjustified dismissal. Her application to the Authority complained about the lack of information given to her about the Griffins’ complaint, failure of her managers to investigate it and give her an adequate opportunity to explain concerns about her work, and the ultimatum given to her to accept an alternative role or be dismissed.

[7] CHR denied it had acted unfairly in its treatment and dismissal of Ms Prasad over the Griffins’ complaint about her performance. It said she had declined its offer of an alternative position on the same pay. It was not feasible to accommodate her wish to remain on the Griffins account so the company issued her with the four weeks’ notice of termination permitted by her employment agreement.

### **The Authority’s investigation**

[8] Under oath Ms Prasad, Mr Hokke and Mr Hayes each gave written and oral evidence for the Authority investigation. Mr Kaddour has left his CHR role since Ms Prasad’s dismissal and, although requested by the Authority, no arrangements were made for him to give evidence.

[9] At the end of the investigation meeting the parties were given an oral indication of preliminary findings.<sup>1</sup> They then endeavoured to resolve the matter themselves with the assistance of a Ministry of Business employment mediator but were unable to do so. Having since reflected on the evidence this determination confirms, for the most part, the preliminary indication given. As permitted by s 174E of the Employment Relations Act 2000 (the Act) it has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

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<sup>1</sup> Employment Relations Act 2000 s 174B.

## **The issues**

- [10] The issues requiring investigation and determination were:
- (i) Was Ms Prasad unjustifiably disadvantaged by not being provided with sufficient information about the concerns raised by Griffins and how those concerns were dealt with?
  - (ii) Was Ms Prasad's dismissal justified (that is, was it what a fair and reasonable employer could have done in all the circumstances at the time)?
  - (iii) If the actions of CHR's representatives were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded, considering:
    - (a) Lost wages; and
    - (b) Compensation under s123(1)(c)(i) of the Act; and
    - (c) Compensation for lost benefits?
  - (iv) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Ms Prasad that contributed to the situation giving rise to her grievance?
  - (v) Did CHR breach good faith obligations in how it dealt with providing information to Ms Prasad about Griffins' concerns and, if so, should a penalty be imposed under s 4A of the Act and, if so, of what amount?
  - (vi) Should either party contribute to any costs of representation incurred by the other party?

## **Unjustified disadvantage**

[11] In its decision in *Harris v The Warehouse Limited* the Employment Court made this observation about employers who act on the basis that 'the customer is always right':<sup>2</sup>

Whilst that cannot be true literally, the statement epitomises the philosophy of [an employer] always satisfying the customer even if the customer may be unreasonable or wrong. As with all bumper sticker slogans, in employment relations' situations, however, its application as a statement of commercial imperative must yield if necessary to the requirements of the law.

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<sup>2</sup> *Harris v The Warehouse Ltd* [2014] NZEmpC 188 at [226].

[12] While CHR could take prompt, prudent action to address a major customer's concerns, it could not have done so without observing the obligations of a fair and reasonable employer in dealing with Ms Prasad over resulting changes to her work. New Zealand law requires an employer to give an employee access to information relevant to the continuation of that employee's employment before making decisions with an adverse effect on that employment.<sup>3</sup> The employee must then have the opportunity to comment on that information before the decision is made. This is part of the statutory duty of good faith to be responsive and communicative.<sup>4</sup> It extends to proposals made by an employer that might impact on an employee, such as here where CHR decided to move Ms Prasad off the Griffins account. Its resulting proposal was that she accept an alternative role, working on sea freight imports, or be dismissed.

[13] Mr Kaddour failed to observe that duty when Ms Prasad had immediately, on hearing of the 27 November email from Griffins, asked to see it. He refused with the resulting effect that she was denied a reasonable opportunity to give any substantive explanation for matters of concern.

[14] And, as it emerged only in the letter of dismissal given to her, she was also not shown earlier emails sent by a Griffins representative over previous weeks or months, which complained about errors in her work. Despite the opening words of the 28 November dismissal letter, Ms Prasad had not attended "numerous performance meetings" about her work for Griffins. She had attended no such formal meetings at all.

[15] Mr Hokke said he had talked to her about the content of some of those emails when each arrived, dealing with whatever specific error was mentioned. However he had not shown her the whole emails. Mr Hokke had not considered any of the errors mentioned in those emails were sufficiently serious to require any performance management process. He said he did not think she should be shown the 27 November email because he did not want to demotivate her and the company wanted to keep her employed. However that approach meant Ms Prasad was not made aware of the extent or severity of concerns expressed by a Griffins representative about her work or how she was doing it.

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<sup>3</sup> Employment Relations Act 2000, s 4(1A)(c)(i) and (ii).

<sup>4</sup> Employment Relations Act 2000, s 4(1a)(b).

[16] This defect in CHR's procedure, by not showing her information on which its decision was based and not giving her a reasonable opportunity to comment before taking the action of removing her from work on the Griffins account, resulted in Ms Prasad being treated unfairly.<sup>5</sup> The unfairness was not simply moving her from the account. Such a move could have been rationalised, if carried out fairly, as a necessary business decision. However, denying her access to the information in the Griffins emails meant Ms Prasad could not properly assess the reason for the change. This led to her resisting, as unreasonable, the prospect of taking up the alternative role offered to her. It was her refusal that led to the decision taken, according to his evidence, by Mr Hayes to dismiss her. If she had access to better information, which a fair and reasonable employer could not have withheld from her, she was likely to have better understood and accepted the rationale for the move, even if she did not agree with it.

[17] There was a disadvantage to Ms Prasad in the alternative role she was offered, although it was to be on the same pay. The export role, working for CHR's premier customer, was more complex than the alternative role she was offered in sea freight imports. It fitted her previous experience and her view of developing a career in export roles. While the import role may, formally, have been at the same level in the company hierarchy, an export role servicing a higher status brand customer was of greater career value. To be removed from the export role was, at least on some measure, a demotion.

[18] She was also unjustifiably disadvantaged by the haste with which the decision was made. Mr Hayes accepted, in answer to a question at the investigation meeting, that there was "a possibility" that Ms Prasad may have accepted the change, and avoided dismissal, if she were given more time to reflect on the offer of a different position. Instead she was dismissed barely 24 hours after being told of Griffins' concerns and being given an ultimatum about accepting an alternative position. Even allowing for the incomplete nature of the information given to her about the situation, she was given no 'cooling off' period to better consider her options. She was about to begin a week's pre-arranged annual leave on 29 November and was due to have returned from that leave on 5 December. Mr Hayes said CHR had not considered the

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<sup>5</sup> Employment Relations Act 2000, s 103A(5).

option of allowing her to think over the offer until then because they wanted to deal with the matter while Mr Kaddour was in town.

### **Unjustified dismissal**

[19] Because CHR disadvantaged Ms Prasad – by denying her relevant information, a reasonable opportunity to comment on the full picture and requiring a response from her with unfair haste – its decision to dismiss her was also unjustified.

[20] A fair and reasonable employer could not have failed to give her access to all the information on which the decision was based, failed to provide a meaningful opportunity to comment, and allowed a reasonable time to think about her position. If the CHR managers had done so, their actions may have been found justified if Ms Prasad had then refused the alternative role and then been dismissed if there was genuinely no other role available for her. Or, if Ms Prasad had been more fully in the picture, there was some prospect she might have made what the company at least saw as a more pragmatic decision and accepted the import role, even if she considered criticisms of her work by the Griffins' representative were misconceived.

[21] In his evidence Mr Hayes, and Mr Kaddour in his letter of dismissal, said there was either “no choice” or “no alternative” but to dismiss Ms Prasad on 28 November. There clearly was an option open to a fair and reasonable employer in that situation. It was to provide all the information on which they relied, an opportunity to correct and explain, and some reasonable time for reflection. Having failed to do so, they could not have proceeded to the decision to dismiss in the way and in the timeframe that they did. Ms Prasad established that her employment ended by unjustified dismissal.

### **Remedies**

#### *Lost wages and benefits*

[22] Ms Prasad was still out of work at the time of the Authority investigation meeting, almost five months after her dismissal. Having established her personal grievance she was entitled to an award of three months ordinary remuneration.<sup>6</sup> There were insufficient grounds to extend the lost wages award beyond that period.

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<sup>6</sup> Employment Relations Act 2000, s 123(1)(b) and s 128(2).

Her evidence showed diligent efforts to search for new work in February and March but not during December and January. She had sought work in freight logistics, her main area of work experience, and human resource management, an area in which she majored for her university degree.

[23] Ms Prasad's annual salary of \$75,000 was paid on a per calendar month basis. The order for reimbursement of lost ordinary time remuneration for three months totalled \$18,750.

[24] Ms Prasad also sought compensation for the monthly value of three benefits paid as part of her salary package: \$65 for a health and wellbeing allowance, \$189 as CHR's contribution to her Kiwisaver account and \$123 for health insurance.<sup>7</sup> The order for compensation for loss of those benefits, also for a three month period, totalled \$1131.

[25] On the gross earnings comprising those two sums awarded for lost wages and benefits, CHR must also pay Ms Prasad the holiday pay to which she would, but for her unjustified dismissal, have been entitled during that three month period. The sum due as holiday pay is \$1,590.

*Compensation for humiliation, loss of dignity and injury to feelings*

[26] Ms Prasad said she was "so embarrassed and ashamed that I got fired". She had still not told her immediate family members, who live abroad, she was dismissed. She was frequently sleepless and tearful as she thought over those events. She had also been prescribed medication to assist with anxiety resulting from her situation.

[27] Considering her particular circumstances and the range of awards in similar cases, \$10,000 was an appropriate amount to compensate Ms Prasad for the humiliation, loss of dignity and injury to her feelings from her dismissal and how it happened.<sup>8</sup>

*Any reduction of remedies for contributory conduct?*

[28] Under s 124 of the Act the Authority must, when determining remedies, consider whether any actions of Ms Prasad contributed to the situation that gave rise

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<sup>7</sup> Employment Relations Act 2000, s 123(1)(c)(ii).

<sup>8</sup> Employment Relations Act 2000, s 123(1)(c)(i).

to her grievance. If they did, those actions may require a reduction of remedies that would otherwise be awarded to Ms Prasad.

[29] CHR had not given Ms Prasad a reasonable opportunity to comment, at the time they occurred, on concerns that a Griffins representative raised about her work. In arrangements made for the Authority investigation CHR was asked to provide its correspondence from Griffins about Ms Prasad's work. It did not provide that evidence. As a result there was no sufficient basis to evaluate her actions or to find that there was blameworthy conduct by Ms Prasad, comprising repeated and unexplainable errors, which had contributed to the situation giving rise to her grievance. Accordingly, no reduction of remedies was required.

### **Penalty for breach of good faith**

[30] CHR, through the actions of Mr Kaddour, failed to provide Ms Prasad with access to information and an opportunity to comment on it, despite her requests for it on both 27 and 28 November. His 28 November letter of dismissal included eight extracts from earlier correspondence from Griffins about her. She had seen none of them before and was not given a proper, prior opportunity to comment on them, in the context of whatever events resulted in those critical comments about her work being made. This breached CHR's duty of good faith to be responsive and communicative. If Ms Prasad was properly informed earlier there was at least the prospect that she could have corrected whatever concerns were fairly raised about her work.

[31] Mr Kaddour refused her request for the correspondence so the failure was deliberate. The denial had a serious effect on events that led to her dismissal. The failure to disclose the contents of the 27 November and earlier emails was sustained behaviour, not meeting the good faith obligation of openness. Those three elements of failure – deliberate, serious and sustained – made CHR liable for a penalty for a breach of good faith.<sup>9</sup> Such failures undermine the Act's object to build productive employment relationships. The breach in failing to provide relevant information was deliberate, albeit for a supposedly well-intentioned purpose of not wanting to 'demotivate' Ms Prasad in her work. It resulted in Ms Prasad losing her job while demanding information she, reasonably in the time and context, believed she was

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<sup>9</sup> Employment Relations Act 2000, s 4A(a).

entitled to see. It left her vulnerable as an employee in a situation for which CHR has not since sought to compensate or mitigate.<sup>10</sup>

[32] A penalty is warranted to punish CHR for that failure and to deter other employers from withholding information from workers that is relevant to the future of their employment. Accordingly CHR must pay to the Authority, for transfer to a Crown Bank Account, \$2000 as penalty for its breach of the duty of good faith in how it dealt with Ms Prasad on 27 and 28 November. There was no sufficient reason, in this case, for any part of that penalty to be paid to Ms Prasad rather than the Crown.

### **Costs**

[33] At the Authority investigation meeting Ms Prasad confirmed she had incurred no costs of representation in bringing her application to the Authority. There is no order for costs.

Robin Arthur  
Member of the Employment Relations Authority

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<sup>10</sup> Employment Relations Act 2000, s 133A.